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No. 91-1704

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

OVERSEAS MOTORS, INC.,

Petitioner,

v.

MIROLJUB MITKOVSKI,
and
NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

- AND APPENDIX -

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS IMPROPERLY INTERFERED WITH THE NATIONAL LABOR RELATIONS BOARD'S POWER TO PROTECT ITS OWN PROCESSES BY REVERSING THE BOARD AND AWARDING BACKPAY TO A DISCRIMINATEE WHO COMMITTED PERJURY AND WHO SUBORNED PERJURY.

RULE 29.1 STATEMENT

Overseas Motors, Inc. has no parent companies or subsidiaries.

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MIROLJUB MITKOVSKI,
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NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Overseas Motors, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on January 29, 1992.

OPINIONS BELOW

The January 29, 1992 Decision of the Court of Appeals for the Sixth Circuit has not been reported. It is reprinted in the Appendix hereto, p. A-1, *infra*. The May 11, 1987 Decision of the Court of Appeals for the Sixth Circuit is reported at 818 F.2d 517, and is reprinted in the Appendix hereto, p. A-98, *infra*. The November 23, 1983 Decision of the Court of Appeals for the Sixth Circuit is reported at 721 F.2d 570, and is reprinted in the Appendix hereto, p. A-146, *infra*.

The September 27, 1990 Second Supplemental Decision (On Remand) of the National Labor Relations Board

(the "Board") is reported at 299 NLRB No. 158, and is reprinted in the Appendix hereto, p. A-11, *infra*. The November 19, 1985 Supplemental Decision of the Board is reported at 277 NLRB No. 61, and is reprinted in the Appendix hereto, p. A-107, *infra*. The March 11, 1982 Decision of the Board is reported at 260 NLRB No. 105, and is reprinted in the Appendix hereto, p. A-151, *infra*.

The July 18, 1989 Third Supplemental Decision of the Administrative Law Judge is reported at 299 NLRB No. 158, and is reprinted in the Appendix hereto, p. A-25, *infra*. The March 11, 1988 Second Supplemental Decision of the Administrative Law Judge is reported at 299 NLRB No. 158, and is reprinted in the Appendix hereto, p. A-59, *infra*. The July 3, 1985 Supplemental Decision of the Administrative Law Judge is reported at 277 NLRB No. 61, and is reprinted in the Appendix hereto, p. A-109, *infra*. The October 20, 1981 Decision of the Administrative Law Judge is reported at 260 NLRB No. 105, and is reprinted in the Appendix hereto, p. A-154, *infra*.

JURISDICTION

The jurisdiction of this Court to review the January 29, 1992 Decision of the Sixth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254 and 29 U.S.C. § 160(e). A Petition for Rehearing *En Banc* was denied on March 12, 1992.

STATUTES INVOLVED

The statutes involved in this case are 29 U.S.C. §§ 160(c), 160(e), and 160(f), which are reprinted in the Appendix hereto, pp. A-172, A-174 and A-176, *infra*, respectively.

INTRODUCTION

The Court of Appeals in this case has taken away from the National Labor Relations Board the Board's proper authority to protect the integrity of its processes. The Board appropriately denied backpay to a discriminatee who had provided and suborned perjurious testimony during backpay proceedings. The Board's decision preserves the integrity and accuracy of its proceedings. By reversing the Board, the Court of Appeals has severely limited the Board's authority to ensure honest and accurate testimony in devising remedies for unfair labor practices.

STATEMENT OF THE CASE

This matter was initially remanded by the Sixth Circuit Court of Appeals to the Board on November 23, 1983 with the Board under instructions:

1. to issue an appropriate order against Petitioner, Overseas Motors, Inc. ("Overseas Motors") directing Overseas Motors to cease-and-desist from committing any further unfair labor practices;

2. to impose a notice-posting requirement on Overseas Motors; and

3. to direct Overseas Motors to offer Respondent, Mr. Mitkovski, reinstatement as an employee.

(pp. A-150, and A-151 to A-153).[1] The Board was also charged with the responsibility of conducting a hearing to determine whether any backpay was due for the period commencing with the date of discharge to the

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[1] **Page references are to the Appendix.**

date of the offer of reinstatement (pp. A-150, and A-169 to A-170). The notice was posted and reinstatement was offered to Mr. Mitkovski in July of 1984. That offer was accepted and he once again became an employee of Overseas Motors.

On multiple occasions during the months of February and March, 1985, a backpay hearing in this matter was conducted in the offices of the Board in Detroit, Michigan, the Honorable Robert W. Leiner, Administrative Law Judge, presiding. The hearing was concluded on March 12, 1985, and on July 3, 1985, Judge Leiner issued his Supplemental Decision (p. A-109). Judge Leiner accepted the amount of interim earnings discovered by the General Counsel and determined that for the four year backpay period Mr. Mitkovski was entitled to $93,648.73, plus interest (p. A-145). The Board issued a Supplemental Decision and Order affirming Judge Leiner's rulings, findings, and conclusions, and directed Overseas Motors to make Mr. Mitkovski whole in the amount determined by Judge Leiner (p. A-107).

The Board subsequently filed an application with the Sixth Circuit Court of Appeals for enforcement of the Supplemental Decision and Order. Overseas Motors filed a brief in opposition to the application and on May 11, 1987, a three-judge panel of the Court of Appeals issued a decision denying the Board's application and remanding the case to the Board for further proceedings (p. A-98). The Board entered its own Order remanding the case to Judge Leiner on September 29, 1987.

In its 1987 decision, the Court of Appeals determined that Judge Leiner had impermissibly restricted the cross-examination of Mr. Mitkovski regarding his interim earnings (pp. A-98 and A-103). Based upon testimony adduced at the backpay hearing, the Court found that:

(a) Mr. Mitkovski did automobile repair work at his home during the backpay period and was licensed by the State of Michigan to do such repair work for at least the last two years of the backpay period;

(b) Mr. Mitkovski kept no records of his automobile repair work or the amount he earned;

(c) Mr. Mitkovski's estimated earnings from his automobile work totaled $12,000;

(d) Mr. Mitkovski's total interim earnings, including part-time work for another repair shop, were $14,621.16 and unemployment compensation was an additional $4,061;

(e) Mr. Mitkovski's wife was not employed outside the home;

(f) Notwithstanding the foregoing, Mr. Mitkovski made mortgage payments and supported his wife and his two sons; and

(g) Based upon his own testimony, Mr. Mitkovski spent approximately $2,000 per month, which would amount to $96,000 for the four year backpay period.

(p. A-103). Further, Mr. Mitkovski took four trips to Europe during the backpay period, two of them with his entire family (p. A-104). The Court noted the suggestion by Mr. Mitkovski that the discrepancy between his income and his expenditures could be accounted for by some $70,000 in loans (p. A-104). None of the loan money or the money earned from repairs was reflected in his bank account records (p. A-104). The Court further noted that Mr. Mitkovski had testified under cross-examination that he had a relationship with a wine importing business but claimed that he had no earnings

from the business, even though he had no records to show this and was registered as a salesman for the company with the State of Michigan (p. A-104). He had also not filed tax returns.

The Court of Appeals concluded that based upon the case of *NLRB* v. *Pugh & Barr, Inc.*, 207 F.2d 409 (4th Cir. 1953), *enf. granted after rem.*, 231 F.2d 559 (4th Cir. 1956), Mr. Mitkovski's $ 14,621 in interim earnings, 13.52% of the $ 108,170 earned by the representative employee during the same period, gave rise to the question of whether Mr. Mitkovski made reasonable efforts to find work and that under the circumstances, the award of so large a sum as backpay without the finding of special circumstances could not be justified (p. A-105). Complying with the decision of the Court of Appeals, the Board on September 29, 1987, issued its own Order remanding the case to Judge Leiner for further hearings in accordance with the Court's opinion. On March 11, 1988, Judge Leiner issued his Second Supplemental Decision affirming all of the findings and conclusions made in his First Supplemental Decision (p. A-59).

Counsel for Overseas Motors subsequently obtained evidence in the form of affidavit testimony that Mr. Mitkovski had perjured himself at the initial backpay hearing, that he had planned to and did perjure himself at the second backpay hearing as well, and that all or certain of the loans were not valid, but that they were a sham contrived by Mr. Mitkovski and intended to defraud the Board and Overseas Motors. The affidavits were from certain of the individuals who had purportedly loaned money to Mr. Mitkovski. The envelope containing the affidavits was postmarked in Kansas City and sent anonymously. On October 12, 1988, Overseas Motors' counsel wrote to the Board in Washington, D.C. to advise them of the perjury and to request that the

Board stipulate to a further remand of the matter. On December 16, 1988, the Board issued its order remanding this matter again to Judge Leiner for additional proceedings on the issue of Mr. Mitkovski's perjury.

Judge Leiner scheduled the hearing for April 11, 1989, and additional proceedings were conducted and testimony taken on April 11 and 12, 1989. On July 18, 1989, he issued his Third Supplemental Decision in which he reaffirmed his Second Supplemental Decision of March 11, 1988 (p. A-25). *In reaching his decision, Judge Leiner specifically found that Mr. Mitkovski perjured himself and attempted to suborn the perjury of witnesses at the backpay hearing in an effort to increase his recovery* (pp. A-38 to A-41, A-47 to A-48, A-53 to A-54, and A-55 to A-57).

However, Judge Leiner disregarded the perjury and considered only whether Mr. Mitkovski had concealed earnings. In arriving at the determination that there were not any concealed earnings, Judge Leiner reduced the amount of Mr. Mitkovski's expenditures from $2,000 per month to $1,800 per month and concluded that the remaining shortfall was insignificant (p. A-45). He based his conclusion upon an inference drawn from Mr. Mitkovski's testimony that "close to $2,000" per month meant "somewhat less than" $2,000 per month (p. A-45).

After reviewing the record of the proceedings before Judge Leiner, the Board on September 27, 1990 issued its Second Supplemental Decision and Order denying Mr. Mitkovski all backpay (p. A-11). The Board rejected Judge Leiner's inference regarding the $1,800 and concluded that Mr. Mitkovski's expenditures during the backpay period were in the amount of $2,000 per month (pp. A-16 to A-17) and that there was an "unexplained discrepancy" between Mr. Mitkovski's expenditures and his reported income which could be nothing other than

income from some source or sources that Mr. Mitkovski failed to report (pp. A-17 to A-18). Consistent with such established Board precedent as *Ad Art Incorporated*, 280 NLRB 62 (1983), *Great Plains Beef Co.*, 255 NLRB 1410 (1981), *M. J. McCarthy Motor Sales Co.*, 147 NLRB 605 (1964), and *Robinson Freight Lines*, 129 NLRB 1040 (1960), Mr. Mitkovski was denied all backpay (p. A-18).

Mr. Mitkovski appealed the Board's decision to the Court of Appeals, which reversed the Board (p. A-2). The Court admonished the Board for reaching conclusions without substantial evidentiary support that were different from those of Judge Leiner concerning Mr. Mitkovski's "credibility" and directed that the case be remanded to the Board with instructions to enforce Judge Leiner's Third Supplemental Decision (p. A-10).

Overseas Motors' Petition for Rehearing *En Banc* was denied on March 12, 1992. The jurisdiction of this Court to review the decision of the Court of Appeals is invoked under 28 U.S.C. § 1254 and 29 U.S.C. § 160(e).

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS IMPROPERLY INTERFERED WITH THE NATIONAL LABOR RELATIONS BOARD'S POWER TO PROTECT ITS OWN PROCESSES BY REVERSING THE BOARD AND AWARDING BACKPAY TO A DISCRIMINATEE WHO COMITTED PERJURY AND SUBORNED PERJURY.

Settled precedents of this Court limit the power of Courts of Appeals to review and reverse remedial orders of the National Labor Relations Board. In reversing the Board's order in this case, the Sixth Circuit ignored that body of law in favor of an improperly broad interpretation of this Court's decision in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). The result is a

dangerous precedent which, if allowed to stand, will severely impair the Board's ability to effectuate the policies of the National Labor Relations Act ("the Act").

Section 10(c) of the Act, 29 U.S.C. § 160(c), empowers the Board, upon finding that an unfair labor practice has been committed, to issue

> an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without backpay, as will effectuate the policies of this Act. . . .

This Court has long recognized that Congress granted wide latitude to the Board under § 10(c) to devise remedies effectuating the policies of the Act. Courts of Appeals may overturn the Board's choice of a remedy only under very limited circumstances. As this Court explained in *Fiberboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964):

> The Board's power [to devise remedies] is a broad discretionary one, subject to limited judicial review. . . . The Board's order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."

379 U.S. at 216 (quoting *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943)). This Court has consistently reaffirmed the Board's broad discretion to grant or withhold remedies for unfair labor practices. *See, e.g., Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 898-99 (1984) ("The Court has repeatedly interpreted [§ 10(c)] as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject to only limited judicial

review. . . . [C]ourts of appeals . . . should not substitute their judgment for that of the Board in determining how best to undo the effects of unfair labor practices.") (citations omitted).[2]

In this case, the Board determined that the appropriate remedy for Mr. Mitkovski's unlawful discharge included reinstatement without backpay — an option expressly provided for in § 10(c) — as well as a cease-and-desist order against the Company and a notice-posting requirement. *Overseas Motors, Inc.*, 260 NLRB 810, 815 (March 11, 1982). Accordingly, the Board declined to adopt the administrative law judge's recommendation that Mr. Mitkovski receive backpay.

In support of its decision to deny Mr. Mitkovski backpay, the Board relied on three facts found by the administrative law judge. These facts were: (1) Mr. Mitkovski's expenses exceeded his income during the proposed backpay period; (2) Mr. Mitkovski failed to account for the discrepancy between his expenses and his income; and (3) Mr. Mitkovski perjured himself and attempted to suborn the perjury of witnesses at the hearing on backpay in an effort to increase his recovery. *Overseas Motors, Inc.*, 299 NLRB No. 158, slip. op.

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[2] *See also NLRB* v. *Food Store Employees Union, Local 347*, 417 U.S. 1, 8 (1974) ("Congress has invested the Board, not the courts, with broad discretion to order a violator 'to take such affirmative action . . . as will effectuate the policies of [the Act].'") (*quoting* 29 U.S.C. § 160(c)) (brackets in original); *International Union of Mine, Mill and Smelter Workers, Local No. 15* v. *Eagle-Picher Mining and Smelting Co.*, 325 U.S. 335, 340 (1945) ("[A] court is prohibited from exercising the discretion reposing exclusively in the Board; and it can, therefore, neither affirm nor reverse a Board order relating to back pay on the basis of its own conception of effectuating the policies of the Act."); *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 539 (1943) ("The particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the courts to determine.'") (*quoting International Association of Machinists* v. *NLRB*, 311 U.S. 72, 82 (1940)).

at 7 (pp. A-17 to A-18). From this evidence, the Board inferred that Mr. Mitkovski had unreported outside income. *Id.* Because the Board could not allocate the unreported income to particular quarters for purposes of computing backpay, the Board denied all backpay. *Id.*

The Sixth Circuit paid lip service to this Court's admonition that it was empowered to displace the Board's decision to deny Mr. Mitkovski backpay only if it found that "the order is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the National Labor Relations Act," *Mitkovski* v. *NLRB*, No. 91-5159 (6th Cir. Jan. 22, 1992), slip op. at 11 (p. A-7). Yet the court failed to apply the rule. Indeed, the court's decision is devoid of *any* analysis of whether the Board's decision effectuates the policies of the Act.

Furthermore, by substituting for the Board's decision the administrative law judge's recommended backpay award, rather than remanding the case to the Board, the Court of Appeals has improperly usurped the role of the Board itself to discern how its various remedial tools can best be used to advance national labor policy. "[W]hen a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course." *Food Store Employees Union*, 417 U.S. at 10. It is only in "the exceptional situation [that] crystal-clear Board error renders remand an unnecessary formality." *Id.* at 8. This is not such a case.

The Court of Appeals should not have deprived the Board of its remedial role. The Board's decision clearly effectuates the policies of the Act. The Act is intended

to provide appropriate remedies for unfair labor practices. Honest and accurate presentation of evidence to the Board's administrative law judges is essential to this purpose. This is particularly true when backpay is among the proposed remedies. For, "it remains a cardinal, albeit frequently unarticulated assumption, that a backpay remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices." *Sure-Tan*, 467 U.S. at 900 (emphasis in original). To reward with a large backpay award a charging party who has made the accurate determination of the award impossible, by concealing and misrepresenting sources of income, diminishes the integrity and accuracy of Board processes. Significantly, the future implications of a given remedy are precisely the type of policy considerations which the Board, and *not* a Court of Appeals, is best equipped to address. As this Court has made clear:

> Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.

Sure-Tan, 467 U.S. at 899 (*quoting Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941)).

The Sixth Circuit thus did not apply the appropriate standard for reviewing Board remedial orders. Instead, the Court purported to rely on *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951), as its basis for reversing the Board and reinstating the administrative law judge's backpay award. According to the Sixth Circuit's reading of *Universal Camera*, the Board's chosen remedy could be overturned because

"there was not substantial evidence in the record to support the Board majority's decision to reach conclusions different from the ALJ's concerning Mitkovski's credibility. The Board majority was not justified in denying Mitkovski backpay based on its inferences that he concealed interim earnings. . . ." *Mitkovski* v. *NLRB*, No. 91-5159 (6th Cir. Jan. 22, 1992), slip op. at 11 (p. A-10).

The Court's reliance on *Universal Camera* is misplaced. *Universal Camera* directs Courts of Appeals to consider the "whole record," including findings of an administrative law judge, when ruling upon the substantiality of the evidence supporting Board determinations of fact. 340 U.S. at 495. The case also suggests that when the administrative law judge's fact determinations conflict with the Board's, in determining whether substantial evidence supports the Board's ruling, more weight may be given the administrative law judge's fact determinations when they are based upon the credibility of witnesses, than when they are not. *Id.* at 496.

While this is true, it should have had no bearing upon the Sixth Circuit's ruling in this case. This case did not require the Court of Appeals to weigh the evidence in light of a disagreement between the administrative law judge and the Board. Rather, in order to reshape the case into one fitting the *Universal Camera* mold, the Sixth Circuit manufactured a credibility-based fact dispute between the administrative law judge and the Board where none existed. According to the Sixth Circuit, the Board "reached conclusions different from the ALJ's concerning Mitkovski's credibility" without substantial evidentiary support. *Mitkovski*, slip op. at 11 (p. A-10). But, the Board expressly found "no basis for reversing the [ALJ's credibility] finding" and did not do so. *Overseas Motors, Inc.*, 299 NLRB No. 158, slip op. at 2 n. 4 (p. A-12). The Board based its decision to deny

backpay upon three facts found by the administrative law judge, including the administrative law judge's assessment of Mr. Mitkovski's credibility.

The Board drew an inference from these facts — that Mr. Mitkovski had undisclosed income — which the administrative law judge did not draw. The Board's drawing of inferences from evidence constitutes its informed judgment on matters within its special competence. The Board is uniquely qualified to understand the dynamics of proceedings under the Act, including the motivation of a discriminatee to maximize his backpay. Given Mr. Mitkovski's demonstrated willingness to fabricate evidence in order to increase his backpay award, as found by the administrative law judge himself, the Board reasonably concluded that the objective evidence of his failure to account for the discrepancy between his expenses and income was attributable to his concealing income in an effort to maximize his recovery. 299 NLRB No. 158, slip op. at 7 (pp. A-17 to A-18).

The Sixth Circuit's decision in this case subverts the Board's essential policy-making function by usurping its Congressionally-mandated power to choose the appropriate remedy for unfair labor practices. Moreover, the Court did not even attempt to apply the appropriate standard of review. Instead, the Sixth Circuit improperly recrafted the *Universal Camera* substantial evidence test into a tool for substituting administrative law judge remedies for those of the Board. Such a gross misapplication of the standard governing judicial review of Board remedies should not be allowed to stand.

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CONCLUSION

For these various reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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Dated: April 24, 1992

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APPENDIX TO PETITION FOR CERTIORARI

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DECISION

–NOT RECOMMENDED FOR PUBLICATION–

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

(United States Court of Appeals — Sixth Circuit)

(Filed January 29, 1992)

(MIROLJUB MITKOVSKI, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent, and OVERSEAS MOTORS, INC., Intervenor — No. 91-5159; ON PETITION FOR REVIEW of a Second Supplemental Order of the National Labor Relations Board)

Before: RYAN and SUHRHEINRICH, Circuit Judges; and PECK, Senior Circuit Judge.

PER CURIAM.

In this case we review the decision and order of the National Labor Relations Board [NLRB or Board] dated September 27, 1990. *Overseas Motors, Inc.*, 299 NLRB Dec. (CCH) 158, 136 L.R.R.M. (BNA) 1081 (1990). In a two to one decision, the NLRB denied Miroljub Mitkovski all back pay. The majority of the Board determined that Mitkovski failed to explain adequately the reasons for the discrepancy between the expenditures he claimed and his income during the period in which he was entitled to back pay. From the discrepancy the majority of the NLRB inferred that Mitkovski received income during the back pay period that he did not report to

the Board. Because the Board could not allocate Mitkovski's concealed income to specific quarters of the back pay period, the NLRB majority concluded that Mitkovski was not entitled to any back pay at all.

In this case the issue is whether Mitkovski's former employer, Overseas Motors, met its burden of demonstrating that Mitkovski intentionally concealed income he received during the back pay period. We find that the facts do not permit the Board's inference that Mitkovski intentionally concealed interim earnings. Although we are reluctant to add another chapter to this 1980 dispute, we reverse the NLRB's decision and remand this case to the Board with instructions to grant Mitkovski back pay as hereinafter indicated.

I.

FACTS

The circumstances giving rise to this voluminous litigation began over ten years ago on September 12, 1980. On that date Overseas Motors gave raises to all of its employees. Mitkovski, the highest paid mechanic, received a $0.60 per hour raise; all other mechanics received a $1.20 per hour raise. Mitkovski informed Overseas Motors that he intended to file a complaint with the NLRB because he believed the company discriminated against him regarding a pay raise. In response to Mitkovski's actions and the NLRB's subsequent measures, Overseas Motors engaged in labor practices, which the Board subsequently found to be unfair; the company fired Mitkovski on October 23, 1980.

After investigation and hearings, on March 11, 1982 the NLRB issued an order in which the Board found that Overseas Motors had unlawfully threatened, suspended, and discharged Mitkovski in violation of Sections 8(a)(1) and (4) of the National Labor Relations

Act. 29 U.S.C. §§ 158(a)(1) and (4). The Board ordered Overseas Motors to offer Mitkovski reinstatement and to make him whole for any loss of pay he may have suffered by reason of the company's discrimination against him. *Overseas Motors, Inc.*, 260 NLRB Dec. (CCH) 810, 109 L.R.R.M. (BNA) 1225 (1982). The Sixth Circuit enforced the NLRB decision and order. *NLRB* v. *Overseas Motors, Inc.*, 721 F.2d 570 (6th Cir. 1983).

Overseas Motors did not reinstate Mitkovski until July 11, 1984. Because the parties could not agree on the amount of back pay owed, the NLRB ordered an Administrative Law Judge [ALJ] to conduct a hearing to determine an appropriate back pay award. The first back pay hearing occurred between February 13 and March 12, 1985. On July 3, 1985 the ALJ issued a decision which stated that Mitkovski was entitled to $93,648.73 and interest. The NLRB issued a supplemental decision and order affirming the ALJ's conclusions; the Board directed Overseas Motors to pay Mitkovski the amount determined by the ALJ. *Overseas Motors, Inc.*, 277 NLRB Dec. (CCH) 61, 121 L.R.R.M. (BNA) 1309 (1985). In their findings the ALJ and the NLRB calculated the back pay owed Mitkovski using the "representative employee" method which this Court indicated was a reasonable means of determining back pay in this case. *NLRB* v. *Overseas Motors, Inc.*, 818 F.2d 517, 620 (6th Cir. 1987). In this Court's review of the NLRB's supplemental decision, Overseas Motor's arguments that Mitkovski was not entitled to any back pay were explicitly rejected. *Id.* at 520. In that decision we indicated that the *employer* had the burden to establish facts which would negate the evidence of liability for back pay once the General Counsel had demonstrated the gross amount of back pay due. *Id.* at 521. Nevertheless, we remanded the case because we determined that Overseas Motors had not been given due process. More specifically, we found that

the ALJ erred in prohibiting Overseas Motors from cross-examining Mitkovski on his interim earnings, on the sources of his income, and on his expenditures. *Id.*

Pursuant to the remand, the ALJ held a second back pay hearing on November 30 and December 1, 1987. At the second hearing Overseas Motors cross-examined Mitkovski about loans he allegedly received and about his search for interim employment as an auto mechanic. Overseas Motors called two witnesses from whom Mitkovski had allegedly borrowed money. After the second hearing, the ALJ reaffirmed his order awarding Mitkovski back pay of $93,648.73. The ALJ found the evidence indicated that for the back pay period Mitkovski's income from self-employment, unemployment compensation, and loans amounted to roughly $78,700.00; the ALJ found Mitkovski's expenditures amounted to roughly $90,000.00. Furthermore, the ALJ determined that Overseas Motors failed to demonstrate that Mitkovski did not make reasonable efforts to find interim employment. The ALJ did not find that the discrepancy between Mitkovski's income and expenditures was sufficient to create an inference that Mitkovski had failed to disclose additional interim earnings.

On December 16, 1988 the NLRB ordered the case remanded to the ALJ for inquiry into whether Mitkovski committed perjury concerning interim earnings during earlier hearings, and the ALJ conducted a third back pay hearing on April 11 and 12, 1989. The ALJ determined that Mitkovski lied about $2,000.00 he said he had borrowed from Timothy Keyes, and the ALJ concluded that Mitkovski inflated the amount of a loan from Robert Wagner. The ALJ determined that Mitkovski attempted to suborn perjury by asking Dale Flohr to testify that the Petitioner had not repaid a $7,500.00 note which in fact Mitkovski had already repaid.

At the third back pay hearing the ALJ revised his earlier estimate of Mitkovski's income and determined that the total amount Mitkovski received from all sources during the back pay period was approximately $82,500.00. The ALJ revised his estimate of Mitkovski's expenditures as well. At the third hearing the ALJ found that Mitkovski's estimate of "close to" $2,000.00 per month in expenditures actually meant "somewhat less than" this figure. At ninety percent of $2,000.00 (the ALJ's arbitrary figure for somewhat less than $2,000.00) the ALJ calculated that Mitkovski's total expenditures for the forty-eight month back pay period equalled $86,400.00. Indeed, in arriving at this figure, the ALJ failed to reduce Mitkovski's expenditures to $1,000.00 per month for the six month period Mitkovski remained with family in Yugoslavia; the ALJ had in fact reduced Mitkovski's expenditures by this amount after the second back pay hearing. The ALJ further determined that because the discrepancy between Mitkovski's expenditures and income was small, the shortfall did not suggest that Mitkovski concealed interim earnings. The ALJ found that Overseas Motors did not adequately rebut Mitkovski's claim that he had made good faith efforts to find work. Finally, the ALJ determined that Mitkovski's carelessness with the truth was insufficient to undermine his testimony concerning interim earnings and efforts to find employment.

In a two to one decision on September 28, 1990 the NLRB denied Mitkovski all back pay. See *Overseas Motors, Inc.*, 299 NLRB Dec. 158. The majority believed the 1987 Sixth Circuit remand placed a burden on the General Counsel to demonstrate "special circumstances" justifying the back pay award. See *Overseas Motors*, 818 F.2d at 522, *citing NLRB* v. *Pugh & Barr, Inc.*, 207 F.2d 409, 410 (4th Cir. 1953). The majority found that Mitkovski's expenditures of $96,000.00 during the back

pay period was a determination not within the scope of the remand to the ALJ; thus, the majority did not adopt the ALJ's revised figure for expenditures. The Board majority determined that Mitkovski's income during the back pay period was $82,000.00. The NLRB majority held that Mitkovski failed to explain adequately the reasons for the discrepancy between his expenditures and income. The Board majority inferred that this discrepancy was attributable to income from sources Mitkovski had not reported. Because the NLRB majority believed it could not allocate the unreported income to specific quarters during the back pay period, the Board majority concluded that Mitkovski was not entitled to back pay for any portion of the back pay period. The majority believed that this conclusion was consistent with previous NLRB decisions. See e.g. *Great Plains Beef Co.*, 255 NLRB Dec. (CCH) 1410, 107 L.R.R.M. (BNA) 1097 (1981).

II.

JURISDICTION AND STANDARD OF REVIEW

Pursuant to Section 10(f) of the National Labor Relations Act, 29 U.S.C. §§ 151, 160(f), this Court has jurisdiction to review final orders of the NLRB if the unfair labor practices in question were alleged to have been engaged in within the Circuit. Thus, this Court has jurisdiction over Mitkovski's claim because he asks this Court to set aside the NLRB order denying him all back pay, alleging that the unfair labor practices underlying the Board's order occurred in Michigan.

Where there is substantial evidence in the record as a whole to support the Board's conclusions, these conclusions may not be disturbed upon appeal. See *Hyatt Corp* v. *NLRB*, 939 F.2d 361, 366 (6th Cir. 1991). In an earlier chapter of the *Mitkovski* saga we outlined our standard of review recognizing that NLRB orders should not

be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the National Labor Relations Act. *Overseas Motors*, 818 F.2d at 520, *citing Fiberboard Corp.* v. *NLRB*, 379 U.S. 203, 216, 85 S.Ct. 398, 406, 13 L.Ed.2d 233 (1964). This Court previously found that Overseas Motors committed unfair labor practices which were prima facie violations of the National Labor Relations Act. *Overseas Motors*, 721 F.2d at 571. In a subsequent decision we explicitly rejected Overseas Motors' contentions that Mitkovski was not entitled to any back pay. *Overseas Motors*, 818 F.2d at 520. We conclude that denying Mitkovski all back pay would not further the cause of justice; nor would it further the policies of the Act.

III.

DISCUSSION

Previous Sixth Circuit decisions indicate that the NLRB has the discretion to make inferences different from an ALJ as long as these inferences do not depend upon assessments of demeanor. See e.g. *NLRB* v. *Wooster Div. of Borg-Warner Corp.*, 236 F.2d 898, 907 (6th Cir. 1956), *aff'd in part, rev'd in part*, 356 U.S. 342, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958). The Supreme Court has noted, however, that an ALJ's decision is entitled to substantial weight and that it must be considered when evaluating an NLRB decision and order. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 494, 71 S.Ct. 456, 467-468, 95 L.Ed. 456 (1951). In *Universal Camera* the Supreme Court stated that evidence supporting an NLRB conclusion may be treated as less substantial when an impartial, experienced examiner, who has observed the witnesses, has drawn conclusions different from the Board's conclusions. 340 U.S. at 496, 71 S.Ct. at 468-469. The

Supreme Court's reasoning is particularly appropriate in cases involving the credibility of witnesses before an ALJ. The more important credibility of witnesses is to an appellate court's review, the more weight an appellate court should give to an ALJ's inferences and conclusions. Mitkovski's credibility concerning his interim earnings and his efforts to find work was a key issue before the ALJ. The ALJ's conclusions concerning Mitkovski's credibility were entitled to more deference than the NLRB majority accorded them. The Board majority impermissibly substituted its own conclusions concerning Mitkovski's credibility.

In a back pay case in which the First Circuit reviewed an NLRB decision, the Court rejected the argument that information concerning interim earnings was so inconsistent with established fact that the ALJ could not have formed a supportive basis for a lost earnings determination. *NLRB* v. *Izzi*, 395 F.2d 241 (1st Cir. 1968). The Court held that the ALJ was not precluded as a matter of law from granting a back pay award when the petitioner lied; rather, the Court specifically noted that even though some testimony was unbelievable, it did not require that all testimony be disregarded. *Id.* at 243-244.

In the Sixth Circuit's most recent treatment of Mitkovski's case, *Overseas Motors*, 818 F.2d at 520-521, this Court cited with approval the Fourth Circuit decision, *NLRB* v. *Pugh Barr, Inc.* In *Pugh*, the Fourth Circuit held that if the amount of earned income is small relative to a back pay award, an employee must demonstrate "special circumstances" which indicate why the employee was able to earn so little relative to the award. *Pugh*, 207 F.2d at 410. In *Pugh*, interim earnings amounted to only five percent of the back pay award. In a subsequent decision the Fourth Circuit found that a

labor surplus in the area combined with the employee's age explained the petitioner's difficulty in obtaining employment, and justified the payment of a back pay award that was large relative to the petitioner's interim earnings. *NLRB* v. *Pugh & Barr, Inc.*, 231 F.2d 558, 559 (4th Cir. 1956).

In Mitkovski's case the record indicates that his earnings amounted to roughly fifteen percent of the back pay award. The ALJ made no specific finding of "special circumstances" that justified an award of back pay that was large relative to Mitkovski's interim earnings. The ALJ indicated, however, that blackballing at several local auto dealerships made it difficult for Mitkovski to obtain employment. Moreover, the ALJ noted that Mitkovski could not have worked as a private mechanic to earn additional income during much of the back pay period because he left his tools as collateral for one of his loans. Based on the ALJ's findings, we are satisfied that Mitkovski has adequately demonstrated circumstances that explain why he is entitled to a back pay award which is large relative to his interim earnings.

IV.

CONCLUSION AND ORDER

As the ALJ found, Mitkovski attempted to inflate the value of the loans he received during the back pay period. This finding does not permit the inference that Mitkovski concealed interim earnings, however. Nor does it demonstrate that Mitkovski failed to search for interim employment. We agree with the ALJ that Overseas Motors failed to prove that Mitkovski supported himself and his family through earnings that he intentionally concealed. We find the evidence indicates that Mitkovski is entitled to a large back pay award relative to his income during the back pay period due to special

circumstances underlying his petition. Accordingly, we hold there was not substantial evidence in the record to support the Board majority's decision to reach conclusions different from the ALJ's concerning Mitkovski's credibility. The Board majority was not justified in denying Mitkovski back pay based on its inferences that he concealed interim earnings or failed to seek employment during the back pay period. The NLRB was not permitted to infer facts which the employer had the burden of proving.

For the reasons stated above, we reverse the NLRB's second supplemental decision, and we direct the Board to enforce the ALJ's third supplemental decision dated July 18, 1989 which reaffirmed the ALJ's order of March 11, 1988.

Petition granted; reversed and remanded with instructions.

SECOND SUPPLEMENTAL DECISION AND ORDER

(Before the National Labor Relations Board)

(Dated September 27, 1990)

299 NLRB No. 158

SCD
D-1001
Livonia, MI

(OVERSEAS MOTORS, INC. and MIROLJUB MITKOVSKI, an Individual — Cases 7-CA-18251, 7-CA-18355, 7-CA-18477)

On July 18, 1989, Administrative Law Judge Robert W. Leiner issued the attached third supplemental decision.[1] The Respondent filed exceptions[2] and a supporting brief, and the General Counsel filed cross-exceptions,[3] a supporting brief, and a brief in response to the Respondent's exceptions.

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1 The judge issued a first supplemental decision on July 3, 1985. On November 19, 1985, the Board issued a Supplemental Decision and Order (277 NLRB 552) adopting the judge's decision. On May 11, 1987, the United States Court of Appeals for the Sixth Circuit denied enforcement of the Board's Order and remanded the case to the Board for further proceedings. *NLRB* v. *Overseas Motors*, 818 F.2d 517.

Thereafter, the Board accepted the remand and ordered the case remanded to the judge for further hearing in accordance with the court's opinion. On March 11, 1988, following the remanded hearing, the judge issued the attached second supplemental decision. On October 18, 1988, while this decision was pending Board review, the Respondent filed an unopposed request for a remand of the case for further hearing on the basis of newly discovered evidence of "possible perjury" by discriminatee Miroljub Mitkovski at the remand hearing. On December 16, 1988, the Board granted the Respondent's request and ordered the case remanded to the judge for further hearing and to prepare a third supplemental decision.

2 The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

3 We grant the General Counsel's unopposed motion to correct minor errors in the transcript and in one of the General Counsel's exhibits.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the second and third supplemental decisions (attached hereto) and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[4] and conclusions only to the extent consistent with this Second Supplemental Decision and Order.

In his first supplemental decision, which was adopted by the Board, the judge found that discriminatee Miroljub Mitkovski was entitled to approximately $94,000 backpay, the difference between the $108,000 he would have earned during the 4-year backpay period had he not been discharged and his approximately $14,000 in interim earnings. Although the judge found that Mitkovski's expenses during the backpay period were $36,000 and that he received only $18,000[5] in income, the judge rejected the Respondent's contention that such a large discrepancy led to the inference that Mitkovski was concealing interim earnings. The judge accepted Mitkovski's explanation that he had received several loans during the backpay period, noting that it was the Respondent's burden to litigate the question of the existence or nonexistence of loans as well as to show that there were other interim earnings.

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[4] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[5] The $18,000 represents $14,000 in interim earnings and $4000 in unemployment compensation.

The court denied enforcement of the Board's Order and remanded the case to the Board. The court found that "the ALJ impermissibly restricted Overseas' cross-examination of Mitkovski regarding his interim earnings, thereby depriving Overseas of a fair hearing." 818 F.2d at 519. Specifically, the court was concerned with the large discrepancy between income of $18,000 and the $96,000[6] in expenses that Mitkovski testified he spent during the 4-year period. Although the court noted that Mitkovski claimed loans of $70,000 to account for this discrepancy, it concluded that the administrative law judge erred by denying the Respondent the opportunity to question Mitkovski about the loans. The court also noted that the failure by Mitkovski to keep records of work he performed while self-employed as well as his failure to use his bank accounts during the backpay period were "suspicious circumstances" warranting closer scrutiny. Finally, the court noted, citing *NLRB* v. *Pugh & Barr, Inc.*,[7] that, in the absence of "special circumstances," the large discrepancy between Mitkovski's reported interim earnings and what he would have earned had he not been discharged suggested that he had not made reasonable efforts to find interim employment if his reported earnings were in fact accurate. The court concluded by stating, "[b]ecause we do not know what cross-examination would disclose, we do not know whether special circumstances here explain what might otherwise appear incredible." Id. at 522.

On remand, the judge reaffirmed his prior Order that Mitkovski be awarded full backpay. He found from the

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6 The court found no record evidence supporting the judge's finding that Mitkovski's expenses were only $36,000 during this period. Rather, the court noted Mitkovski's own testimony that his expenses during the backpay period were $2000 a month.

7 207 F.2d 409 (4th Cir. 1953), granting enforcement after remand 231 F.2d 558 (4th Cir. 1956).

evidence adduced in the remanded hearing that seven people loaned Mitkovski a total of $60,000 and that he had additional income of $18,682 derived from part-time work, self-employment, and unemployment compensation for a total of $78,000 in gross receipts over the 4-year backpay period. As to expenses, the judge found that Mitkovski's backpay period expenses were closer to $90,000 than the $96,000 figure cited by the court. The judge concluded that although there remained a $12,000 shortfall between income and expenditures ($90,000 minus $78,000), this was insufficient to meet the Respondent's burden to establish that Mitkovski concealed interim earnings. The judge also concluded that the Respondent failed to prove that Mitkovski did not make reasonable efforts to find interim employment.

The General Counsel and the Respondent filed exceptions to the judge's decision and subsequently the Respondent filed a letter requesting the Board to remand the case for further hearing contending that the General Counsel possessed "material evidence in the form of affidavit testimony of possible perjury" by Mitkovski. The General Counsel filed a response denying having any such evidence but stated that in light of the gravity of the allegations she would not oppose a remand. The Board granted the Respondent's request and ordered the case remanded to the judge for further hearing with regard to the issue of perjury and to prepare a third supplemental decision.

In his third supplemental decision, the judge, although finding that Mitkovski did commit perjury in testifying about the loans he received, reaffirmed his prior Orders that Mitkovski be awarded full backpay.

With regard to the perjury finding, documentary evidence of 11 promissory notes executed by 8 lenders were introduced with face values totalling $67,850. The

judge found, however, that two of the notes were fictitious and that another was inflated. As to the fictitious notes, the judge found that Mitkovski's neighbor, Tim Keyes, executed two separate promissory notes totaling $2000 in favor of Mitkovski but that Keyes never transferred any money to him. Instead, according to Keyes' credited testimony, Mitkovski asked him to sign the notes so that he could prove the source of his income during the backpay period.[8] Keyes also testified that sometime before the 1987 remanded hearing, Mitvovski warned him that a Board agent would visit him to discuss the loans. The judge concluded, therefore, that Mitkovski lied in testifying that Keyes loaned him $2000, in denying that he told Keyes that a Board agent would contact him about the loans, and in denying that he executed the notes in order to show the source of his income.

With regard to the inflated promissory note, the judge found that Robert Wagner loaned him $3600 but that Mitkovski drafted a note stating that he borrowed $5000. The judge further found that Mitkovski testified untruthfully when he denied telling Wagner that he borrowed the money in order to show how he lived and by denying telling Wagner that someone from the Board would be coming to speak to him about the loan.

In addition to giving perjured testimony, the judge found that Mitkovski attempted to suborn perjury with regard to a $7500 loan that he obtained from Dale Flohr. Prior to the 1987 remand hearing, Mitkovski contacted Flohr and asked him to tell anyone who might question him that the loan had not been repaid when,

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[8] **Throughout these proceedings, Mitkovski was under the apparent misconception that the amount of backpay that the Board would eventually award him depended on the loan debt he incurred during the backpay period.**

in fact, it had been repaid. At first, Flohr cooperated by submitting a sworn statement to a Board agent that the loan had not been repaid. The following day, however, Flohr recanted his statement and told the truth.

From the evidence submitted at the hearing, the judge adjusted his prior calculations to show that during the backpay period Mitkovski's income from loans, interim employment and unemployment compensation totaled approximately $82,500[9] and that his expenses ranged between $86,400 and $91,200,[10] leaving a shortfall somewhere between $4000 and $9000. Although he found that Mitkovski lied with regard to the existence and value of some of the loans and suborned perjury from a witness, the judge determined that neither this conduct nor the shortfall supported an inference that Mitkovski concealed earnings or failed to make a diligent search for employment. Accordingly, the judge reaffirmed his prior Order that the Respondent pay the full backpay amount previously determined. Contrary to the judge, we conclude that Mitkovski is not entitled to any backpay.

We start from the proposition that we are deciding this case within the scope of a limited remand from the court of appeals and the findings and conclusions of the court must be treated as the law of the case. The court concluded that during the backpay period Mitkovski had expenses of approximately $96,000. It

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9 This figure represents a total loan amount of approximately $64,000 plus $18,682 in unemployment compensation and earnings from interim employment.

10 The judge arrived at these figures by noting that Mitkovski testified in the original backpay hearing that his expenses were "close to" $2000 a month. He concluded that "close to" should be interpreted as meaning "somewhat less than" $2000 a month, i.e., either 90 percent of $2000 ($1800 per month) or 95 percent of $2000 ($1900 per month).

then noted a discrepancy between that amount and Mitkovski's interim earnings, and it found error in the prior Board hearing in the failure to allow the Respondent to question Mitkovski concerning certain matters, including loans he alleged he had received, which would account for the discrepancy. In citing *NLRB* v. *Pugh & Barr, Inc.*, 207 F.2d 409 (4th Cir. 1953), the court also indicated that it viewed this as a situation in which the apparent discrepancy between expenses and reported income created sufficient suspicion to shift the burden to the General Counsel (on behalf of the claimant) to show "special circumstances" that would "explain what might otherwise appear incredible."

We do not believe a redetermination of Mitkovski's expenses to be within the scope of the remand. We therefore do not agree that the figure of approximately $96,000, which was based on testimony Mitkovski himself gave in the earlier proceeding, was subject to readjustment on the basis of recantations by Mitkovski in the hearing on remand.[11] Hence, in determining whether the burden apparently imposed by the court has been satisfied, we must find that Mitkovski obtained that amount of money from *somewhere* during the backpay period. We further know, from facts found by the judge after he was [*sic*] determined that Mitkovski had lied about some of the loans, that Mitkovski has identified sources of income (including loans from friends and neighbors) amounting to only $82,500. Accordingly, there is an unexplained discrepancy of $13,500, and it is not credible that this could be anything other than income from some source or sources that Mitkovski has

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[11] We agree with the Respondent that this could not be treated as some offhand comment of Mitkovski in the earlier proceeding that he could be allowed to "correct" on further consideration in the new proceeding. As the Respondent points out, Mitkovski testified earlier that he had supplied the figure of "close to $2000 per month" to the Board's compliance officer, and that in doing so he had explained to that officer exactly how he had arrived at that figure.

not reported. Moreover, because Mitkovski has failed to account for this, we do not know what those sources were or during which backpay quarter or quarters this money was received.[12] We conclude, particularly in light of Mitkovski's perjury and his attempt to suborn perjury of another witness, that he has not satisfied the burden the court has implicitly placed on him of showing "special circumstances" that explain "what might otherwise appear incredible." Accordingly, we shall deny Mitkovski all backpay.[13]

ORDER

The backpay specification is dismissed.

Dated, Washington, D.C. September 27, 1990

James M. Stephens, Chairman
Dennis M. Davaney, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[12] We note that to the extent there is evidence from which it can be inferred that a claimant has received a substantial sum of money and that amount cannot be attributed to any perticular quarter or quarters in the backpay period, denying all backpay to Mitkovski is consistent with such cases as *Great Plains Beef Co.*, 255 NLRB 1410 (1981); *M. J. McCarthy Motor Sales Co.*, 147 NLRB 605, 615-618 (1964); and *Robinson Freight Lines*, 129 NLRB 1040, 1043 (1960). See also *Ad Art, Inc.*, 280 NLRB 985 (1986).

[13] Contrary to our dissenting colleague, we construe the court's remand as effectively shifting the burden to the General Counsel and the claimant to show "special circumstances." In this regard, it is clear that the court denied enforcement of the Board's backpay award in part because it was troubled by what it characterized as "suspicious circumstances" pertaining to, inter alia, the shortfall between Mitkovski's income and his expenditures, the absence of records of certain earnings, and Mitkovski's failure to use bank accounts. Indeed, as noted, the very purpose of the remand was to determine whether Mitkovski could show special circumstances sufficient to allay the court's concerns on these matters. Instead, the remand revealed evidence of Mitkovski's perjury and attempts to suborn perjury regarding the shortfall, leaving the unexplained discrepancy of $13,500 derived from unreported income. In these circumstances, we are constrained by the court's remand to deny backpay in this case.

MEMBER CRACRAFT, dissenting

Reversing the judge, my colleagues have concluded that the discriminatee Miroljub Mitkovski has forfeited all backpay because he was discredited with respect to the existence or value of some personal loans during the 4-year backpay period and because he did not adequately explain the $13,500 difference between his total income and the expenses he incurred during this period. To reach this conclusion my colleagues infer that Mitkovski must have intentionally concealed interim earnings and that by withholding information regarding these supposed earnings he has made it impossible to compute the amount of backpay to which he might otherwise be entitled. Contrary to the majority, I agree with the judge that such an inference here is unwarranted.

The central issues in this case are whether the Respondent has met its burden of proving that Mitkovski failed to make reasonable efforts to seek interim employment or that he intentionally concealed interim earnings. Based on the credited testimony of Mitkovski, as well as the Respondent's failure to challenge this testimony, the judge found that the Respondent failed to carry its burden on both issues. Nonetheless, the majority permits the Respondent to collaterally attack the award, not with newly discovered factual evidence, but solely on the basis of an inference drawn from several episodes of untruthfulness in Mitkovski's testimony. I agree with the judge that Mitkovski's dishonesty, while certainly not to be condoned, does not support the inference sought here by the majority.

In resolving the issues presented in this case, it is important to bear in mind the firmly established principle that "the backpay claimant should receive the

benefit of any doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved." *United Aircraft Corp.*, 204 NLRB 1068 (1973). It is also well established that an administrative law judge has the discretion to credit a witness' testimony in part and discredit it in part. As Judge Learned Hand observed in *NLRB* v. *Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), "[N]othing is more common in all kinds of judicial decisions than to believe some and not all" of a witness' testimony.

The judge found that, notwithstanding Mitkovski's specific instances of dishonesty, "there is no evidence whatsoever that Mitkovski enjoyed any unreported earnings in the backpay period." (Emphasis in original, third sup. JD slip op. at 19.) In this regard, the judge noted that the loans Mitkovski received were repaid outside the backpay period, negating any suggestion or inference that the funds used to repay the notes were derived from concealed earnings within the backpay period. Similarly, the judge found that because Mitkovski had repaid the loan to Dale Flohr outside the backpay period, his attempt to have Flohr tell the Board agent that the loan had not been repaid was "subornation of an immaterial fact."

Thus, the judge concluded (third sup. JD slip op. at 21):

> Again, the evidence adduced both in the 1987 remanded hearing and in this 1989 reopened hearing does not show or even suggest that Mitkovski had unreported earnings in the backpay period. Rather the evidence adduced herein shows that he was a liar, a finagler and a suborner of perjury on immaterial elements. His lies and subornation however, without some

proof of some unreported interim earnings, do not support an inference that he had unreported earnings in the backpay period.

Nor do I conclude, as Respondent would have me, that his various lies and subornation are sufficient to undermine his testimony with regard to his search for interim employment. As above noted, Mitkovski named names of places he sought employment and Respondent failed to contradict Mitkovski's testimony. Where there was an attempt to elicit from Mitkovski *where else* he sought work in the backpay period, Respondent successfully blocked the attempt to gain such testimony and failed to adduce its own evidence of Mitkovski's failure to seek interim employment during the backpay period. Under such circumstances I do not infer, from Mitkovski's perhaps periodic untruthfulness and venal acts that the evidence of where Mitkovski actually sought employment (or where Respondent blocked the eliciting of such evidence) should be disregarded in favor of an inference of unreported interim earnings or failure to seek interim employment derived from untruthfulness. To do so would be to substitute an untenable inference in the face of facts which Respondent intentionally failed to disprove in limiting its backpay liability. Respondent has thus failed to prove the existence of unreported interim earnings, the absence of attempts to seek interim employment, or the General Counsel's engaging in a conspiracy to cover-up the above allegations. Respondent has failed to support its burden of proof on these points. [Emphasis in original.]

In light of the judge's credibility resolutions, I agree with the judge's reasoned analysis and am unwilling to make the inference that Mitkovski intentionally concealed interim earnings.[1]

The majority, based on the court's citation of the Fourth Circuit's decision in *NLRB* v. *Pugh & Barr, Inc.*, 207 F.2d 409 (4th Cir. 1953), shifts the burden to the General Counsel to establish that Mitkovski did not conceal interim earnings. Such an approach is clearly inconsistent with the court's decision. The court specifically stated:

> The General Counsel has a duty only to show the gross amount of back pay due, *i.e.*, the amount of money that the employee would have earned had the employer not violated the National Labor Relations Act. . . . Once he has done so, "the burden is upon the *employer* to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability." *NLRB* v. *Overseas Motors*, 818 F.2d 517 (6th Cir. 1987), citations omitted; emphasis in original.]

The court's discussion of *Pugh & Barr* is in the context of the second issue in the instant case, i.e.,

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[1] **The majority's finding of a $13,500 "shortfall" between income and expenses over a 4-year period does not persuade me to draw an inference of intentionally concealed interim earnings. As the judge stated in his second supplemental decision, Mitkovski was not a recordkeeper but that fact does not establish deception. ALJD slip op. at 17 fn. 8. In this regard, I note that the Board has long held that "poor record keeping, uncertainty as to memory, and perhaps exaggeration" do not automatically disqualify an employee from receiving backpay. *Pat Izzi Trucking Co.*, 162 NLRB 242, 245 (1966), enfd. in pertinent part 395 F.2d 241 (1st Cir. 1968). Furthermore, a "back pay award is only an approximation, necessitated by the employer's wrongful conduct." *Bagel Bakers Council of Greater New York* v. *NLRB*, 555 F.2d 304, 305 (2d Cir. 1977). To the extent uncertainties exist on this question, I would resolve them against the Respondent, the wrongdoer who bears the burden of proof.**

whether Mitkovski made a reasonable search for interim work, not whether Mitkovski concealed interim earnings. Because of the large discrepancy between gross backpay and interim earnings during the backpay period, the court in *Pugh & Barr* remanded the case to the Board to establish whether the discriminatee had made reasonable efforts to obtain interim employment, and when the Board subsequently established that he had, the court enforced the Board's backpay award.

Here, as noted above, the judge found that in his testimony Mitkovski named the places that he had sought work and that the Respondent not only failed to contradict his testimony, but actually prevented further inquiry into Mitkovski's search for employment. Under these circumstances, I agree with the judge that Mitkovski made reasonable efforts to find interim employment and that any failure in the record to adequately explore whether Mitkovski could have been more diligent in obtaining interim employment is attributable to the Respondent.

In *American Navigation Co.*, 268 NLRB 426, 427 (1983), the Board held that a discriminatee's intentional concealment of interim earnings would result in the discriminatee's forfeiture of backpay for the quarters in which concealed employment occurred. The related cases cited by the majority hold that the Board will deny all backpay when the intentionally concealed employment cannot be attributed to specific calendar quarters and the calculation of an accurate backpay figure cannot be made. Because there is no evidence that Mitkovski had any unreported interim earnings and because Mitkovski's dishonesty does not affect the calculation of a reliable backpay amount for any quarter, the effect of the majority's decision is to extend this precedent to deny all backpay to a discriminatee whose

testimony was discredited only in part. Such a result was specifically rejected in *American Navigation.*

After a full opportunity in two hearings to litigate the issues pursuant to the court's remand, the Respondent has not produced any evidence to support its contentions that Mitkovski failed to make reasonable efforts to find interim employment or that he intentionally concealed interim earnings. Thus, I would not deny all backpay to Mitkovski and dissent from my colleagues' decision to do so.

Dated, Washington, D.C. September 27, 1990

Mary Miller Cracraft, Member
NATIONAL LABOR RELATIONS BOARD

THIRD SUPPLEMENTAL DECISION *(REMAND REOPENED)*

(Before the National Labor Relations Board — Division of Judges)

(Dated July 18, 1989)

JD-171-89
Detroit, MI

(OVERSEAS MOTORS, INC., Respondent, and MIROLJUB MITKOVSKI, An Individual — Cases 7-CA-18251; 7-CA-18355; 7-CA-18477)

STATEMENT OF THE CASE

ROBERT W. LIENER, Administrative Law Judge: Although I herewith attach, and incorporate by reference, the "Second Supplemental Decision (On Remand) which I issued on March 11, 1988, which decision is now currently pending before the Board on briefs and exceptions, it is prudent to restate at this point the prior proceedings in this matter in order to focus on the matters litigated in this reopened, remanded proceeding.

On November 19, 1985, the National Labor Relations Board issued its Supplemental Decision and Order, 277 NLRB 552 (1985) in this matter, wherein it adopted my finding that the Charging Party, Miroljub Mitkovski, was entitled to backpay, for the 4-year backpay period, in the amount of $93,648.73, plus interest. Subsequently, the Board petitioned the United States Court of Appeals for the 6th Circuit for enforcement of its Order.

On May 11, 1987, the Court denied enforcement of the Board's Order and remanded the case to the Board (__ F.2d __, 125 LRRM 2361 (1987)). The Court found that the Administrative Law Judge impermissibly restricted Overseas' cross-examination of Mitkovski regarding his interim earnings, thereby depriving Overseas of a fair hearing. The Court also noted, citing *NLRB*

v. *Pugh & Barr, Inc.*, 207 F.2d 409 (C.A. 4, 1953), enforcement granted after remand, 231 F.2d 558 (C.A. 4, 1956), that, in the absence of special circumstances, the large discrepancy between Mitkovski's reported interim earnings and what he would have earned had he not been discharged, suggested that he had not made reasonable efforts to find interim employment if his reported earnings were, in fact, accurate." The Court remanded the case to the Board for a further evidentiary hearing on these issues.

On August 11, 1987, the Board accepted the Court's remand and, on September 29, 1987, ordered the proceeding remanded to the undersigned to reopen the record, to provide a further hearing in accordance with the Court's opinion, and to prepare a Second Supplemental decision containing findings of fact, conclusions of law and recommendations with respect to the issues on remand.

Pursuant to prior notice of hearing, the remanded hearing was held on November 30 and December 1, 1987 in Detroit, Michigan, wherein all parties were represented by counsel, enjoyed full opportunity to introduce evidence, to examine and cross examine witnesses, to argue orally on the record, and to submit post-hearing briefs. Subsequent to the close of that hearing, General Counsel and Respondent submitted timely briefs which were carefully considered. As above noted, I issued the attached Second Supplemental Decision on March 11, 1988, which decision is pending before the Board.

On October 18, 1988, however, prior to action by the Board on the aforementioned Second Supplemental Decision, Respondent filed with the Board a letter contending that the Board [actually the Office of the General Counsel] ". . . has in its possession material

evidence in the form of affidavit testimony of possible perjury by the Charging Party" and requesting a remand of the case for a hearing before a new Administrative Law Judge. By response of November 23, 1988, counsel for the General Counsel contended that he had no evidence in his files that the Charging Party, or any of the witnesses called to testify at the remanded hearing, had committed perjury either in examination or cross-examination. General Counsel nevertheless conceded that "because the allegations raised are so serious", he "would not oppose a remand regarding the validity of the loans made to the Charging Party." On December 2, 1988, Respondent further specified allegations of perjury by the Charging Party.

The Board, having duly considered the matter, found that a further hearing was warranted to allow Respondent an opportunity to present evidence in support of its allegations regarding possible perjury by the Charging Party. The Board, however, denied Respondent's request that the case be remanded to a different judge.

Accordingly, the Board, on December 16, 1988, in an unpublished Order, remanded to the undersigned the above-captioned proceeding ". . . for the purposes of reopening the record and further hearing with regard to the Respondent's allegations that the Charging Party has committed perjury." It also directed my preparation of a Third Supplemental Decision containing findings of fact, conclusions of law and recommendations with respect to the issue on remand including, if appropriate, a new recommended Order based upon consideration of any additional evidence.

Pursuant to the Board's aforesaid order of December 16, 1988, on January 9, 1989, I issued an Order reopening the record with a notice for a hearing to commence on

March 27, 1989. Thereafter, the hearing, by my order, was postponed to April 11, 1989.[1]

Thus, pursuant to the Board's Order of December 16, 1988 for reopening of the remanded matter, and pur-

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[1] Meanwhile, Respondent, on December 29, 1988, filed a verified complaint for injunctive and other relief in the United States District Court, Eastern District of Michigan, Southern Division, in *Overseas Motors, Inc.* v. *NLRB*, Civil Action No. 88-75112. In an associated request for emergency pretrial conference pursuant to Rule 16 of the Federal Rules of Procedure, Respondent sought a stay of all proceedings before the Board, the depositions of the Charging Party, the various lenders of money to the Charging Party and various attorneys on the staff of the Office of General Counsel, National Labor Relations Board. Alleging jurisdiction *inter alia*, based upon the Board's alleged violation of Respondent's due process rights under the 5th amendment of the Constitution because of misconduct by counsel for the General Counsel, Respondent's prayer for relief included, *inter alia*, a stay of further proceedings in the instant matter; an Order determining that Respondent is not obligated to the Charging Party in any amount whatsoever for backpay; in the alternative, an Order setting aside the above Second Supplemental Decision of March 11, 1988; an Order for a *de novo* hearing before the United States District Court on the issue of backpay; alternatively, further proceedings before the United States District Court to determine whether the Charging Party committed perjury ". . . with the knowledge and concurrence of [the National Labor Relations Board] . . . :" an Order awarding Respondent costs and attorneys' fees; and an Order imposing a fine on the Board as permitted by Rule 11 other [*sic*] Federal Rules of Civil Procedure. On April 6, 1989, the Honorable Bernard A. Friedman, United States District Judge, after hearing, being apprised of the Board's motion to dismiss due to lack of subject matter jurisdiction and of various Respondent motions for injunctive relief, granted the Board's motion to dismiss. He denied as moot Respondent's motions for injunction. The Court's judgment enforcing its order was issued April 6, 1989. Respondent, from time-to-time, has alleged bias and prejudice, other than the above conspiracy, so as to include the undersigned, personnel of Region 7, National Labor Relations Board, including the compliance officer who drafted the original backpay specification, and NLRB personnel in Washington, DC. These allegations have been made to the Board, the United States Court of Appeals and the United States District Court. Respondent neither appealed the above judgment of the District Court to the United States Court of Appeals nor sought a stay in the Court of Appeals of the instant reopened proceeding. In the instant proceeding, Respondent contemplated, but refrained from, moving to disqualify the Administrative Law Judge. (Tr. p. 8)

suant to my orders, a hearing was held on April 11 and 12, 1989, in Detroit, Michigan, wherein all parties were represented by counsel who enjoyed full opportunity to introduce evidence, to examine and cross examine witnesses, to argue orally on the record and to submit post-hearing briefs. Subsequent to the close of the hearing, General Counsel and Respondent submitted timely briefs which have been carefully considered.

Based on the record of all supplementary proceedings as a whole, including my observation of the witnesses and their demeanor as they testified before me, and upon consideration of the post-hearing briefs,[2] I make the following:

FINDINGS AND CONCLUSIONS

I.

THE ISSUES

The Board's unpublished Order, remanding the matter to reopen the record and for further rehearing, states broadly that the purpose of the reopened hearing was "... with regard to the Respondent's allegations that the

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[2] **After filing of briefs, General Counsel submitted a June 22, 1989 motion to strike portions of Respondent's brief as containing references to facts not in the record. General Counsel, in substance, objects to the references to correspondence by, to and from Government personnel and the use of the work "perjury." Respondent opposes the motion. General Counsel's motion is *denied*. The correspondence, both internal to the Office of General Counsel and with and from Respondent discloses the basis for the Board's December 16, 1988 remand order and permits some insight concerning the scope of the instant reopened hearing. Furthermore, since these documents have all been disclosed, and there is no claim of privilege, General Counsel has shown no prejudice. Clearly, Respondent's allegations of Mitkovski's perjury, or subornation, and of General Counsel's conspiracy and cover-up are not proof, merely allegations. But those allegations supported the Board's order to reopen. The General Counsel correctly observes that Respondent submitted no supporting evidence.**

Charging Party has committed perjury. . . ." As the Board's Order observed, counsel for the General Counsel did not oppose the reopening because of the seriousness of the allegations ". . . regarding the validity of the loans made to the Charging Party." In light of the seriousness of the allegations, I interpreted broadly the issues to be litigated in this reopening. They were to include any issues relating to perjury or subornation of perjury by the Charging Party concerning the matters remanded by the United States Court of Appeals (and then by the Board to me) in the Second Supplemental hearing, i.e. to permit Respondent further cross-examination regarding Mitkovski's interim earnings and to show any failure to make good faith efforts to find interim employment. It soon became apparent, however, that the principal litigated issues related to the validity of the loans made to the Charging Party by eight lenders; indeed, whether there were such loans, and, if not, whether the absence of loans led not only to the inference that the Charging Party, during the backpay period, had lived off of funds other than loans (which led to an inference that the source of such funds were hidden interim earnings) but also to whether any perjury or subornation of perjury (relating to the existence and size of the loans) spilled over into questioning the Charging Party's efforts in seeking interim employment.

In this regard, the ultimate issues became (A) did the Charging Party commit perjury or subornation of perjury; (B) if so, in what particulars; (C) to what extent did the Charging Party's alleged unlawful or attempted unlawful acts relate to the issues (in the remand from the United States Court of Appeals and the Board) of (1) on what funds the Charging Party existed during the backpay period; and (2) his efforts at gaining interim employment during the backpay period; and (D) was the Charging Party's perjury or subornation, if any, or

their attempts, on material matters? But the allegations of perjury, subornation, cover-up and interference with witnesses tended to reopen elements not strictly within a narrow reading of the reopening order. I have not read the Board's reopening Order narrowly.

II.

THE LOANS:

In my second Supplemental Decision of March 11, 1988, I found, on the basis of the record as it existed at that time, that there were seven persons making loans of a total of $60,000 to Mitkovski in the backpay period. It was on the finding of $60,000 in loans, together with $18,682 of earnings, in part-time work, self employment and unemployment compensation, that I found that Mitkovski's gross receipts in the 48 months of the backpay period amounted to over $78,000 (*ibid.*). This was the financial basis on which Mitkovski allegedly supported himself and his family during the backpay period. At the outset of the instant hearing, however, the parties stipulated (Tr. pp. 70-74) that there were not seven but eight lenders who received from Mitkovski 11 promissory notes with a face value totalling $67,850.00. If the face value of the loans, $67,850.00 is added to the above $18,682.00 in other receipts during the 4-year backpay period, Mitkovski's receipts in the backpay period would total in excess of $85,000 rather than $78,000 as previously found.

Furthermore, I found in the Second Supplemental Decision (p. 4-5) that there appeared to be a mathematical error in the Court of Appeals' suggestion that Mitkovski's expenses in the 48-month backpay period were about $96,000 ($2,000 per month times 48 months). Rather, I found the figure closer to $90,000 because of Mitkovski and his family spending 6 months

in Yugoslavia[3] where, I concluded, the ordinary $2,000 per month of posited expenses were closer to $1,000 because, in that 6-month period, Mitkovski's Yugoslavia expenses were paid for by his family. I nevertheless rejected the General Counsel's strenuous request (Second Supplemental Decision, p. 4, ftn. 2) that he be permitted to prove that Mitkovski's actual expenses were actually substantially less than $2,000 per month. I ruled that the law of the case, in view of the Court of Appeals Decision, required that all parties be bound by the court's finding that Mitkovski, on his own testimony, had monthly expenditures of $2,000 per month (Second Supplemental Decision, p. 4). The General Counsel had offered to prove that, based on Mitkovski's testimony, the actual expenses for the entire 48-month backpay period were $1300 per month rather than $2,000 per month (Second Supplemental Decision, p. 5). Naturally, the closer that the figure of Mitkovski's funds approaches the amount of expenditures, the weaker is any suggestion of unreported available funds (i.e. hidden interim earnings). One of Respondent's arguments, of course, is that the greater the discrepancy, the greater the urgency of finding unreported interim earnings. Conversely, the closer that reported Mitkovski's backpay period funds approaches living expenses, the less urgent is the appeal of the argument that there exists an inference of unreported interim earnings.

Bearing in mind, therefore, that with the exception of Mitkovski's 6-month period in Yugoslavia which resulted in my finding that about $6,000 of the $96,000 of court-found backpay-period expenses should have been deleted, thus leaving Mitkovski's backpay period

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[3] **This total of 6 months was deleted from the backpay period in the computation of gross backpay.**

expenses of $90,000 rather than $96,000; and having believed, during the reopened hearing, that the matter of Mitkovski's expenses had been otherwise laid to rest, Respondent's post-hearing brief, dated June 15, 1989, page 10, now urges and reminds us, as General Counsel had also previously suggested, that Mitkovski *actually testified* (testimony at the original 1985 backpay hearing, Tr. p. 886) that he did not raise expenses of $2,000 per month; rather, as Respondent notes, that it cost him "close to $2,000 per month for him to live throughout the backpay period." This reminder suggests not that the expenses were *in excess of* $2,000 per month, for, in that case, Mitkovski would have testified or the evidence would have shown that it cost him "more than" $2,000 per month; rather, the words "close to" imply, as General Counsel sought vainly to argue, *less than* $2,000 per month as Mitkovski's monthly actual living expenses. The question then arises *how much* less than $2,000 per month it actually cost him. A figure of 90 percent of $2,000, for example, is certainly "close to" $2,000 per month. That figure, $1800 per month, would mean a total expenditure of $86,000 during the entire backpay period (48 times $1800). Such a figure would match the $85,000 which is the *face value* of the loans, interim earnings and unemployment compensation. Again, this near equality would result even without taking into account the total of the 6-month period in which Mitkovski's expenses, in part, were paid by his relatives in Yugoslavia.

In any event, the testimony at the hearing related not to Mitkovski's expenses, which Respondent's brief has now reopened, but principally to the actual *cash value* of the loans as opposed to the *face value*; and to Mitkovski's attempt to interfere with witness' testimony relating to the loans and their repayment.[4]

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[4] **No testimony was offered concerning misconduct by Board personnel.**

At the hearing, the parties agreed that Respondent had subpoenaed all eight lenders. It also appeared that they had been subpoenaed in the 1987 remanded hearing but more than half were released without testifying. In the instant hearing, they were again subpoenaed and all were released without testifying except the three whose testimony appears below.

III.

TESTIMONY CONCERNING THE ACTUAL CASH VALUE OF THE LOANS AS OPPOSED TO FACE VALUE

(1) The Notes Executed By Timothy Keyes:

Timothy Keyes testified that he moved next door to Mitkovski in 1983. In the period 1980-1984, he said that he never gave money to Mitkovski. However, there were two notes which Keyes executed in favor of Mitkovski: the first, a note dated August 1, 1983 in the sum of $800; and a further note of March 8, 1984 in the sum of $1200. The total Keyes notes in favor of Mitkovski therefore are $2,000. Keyes testified that he never gave any money under the two notes, or otherwise, to Mitkovski in the backpay period. He recalled that in the execution of the 1983 note, Mitkovski said he was trying to show that he had some "money coming in" and asked Keyes if he would sign the note to help support that showing. Later, Keyes said that Mitkovski told him that someone from the National Labor Relations Board might be coming to see him about the notes. He had no further conversations with Mitkovski regarding the notes or any impending visit from a Board agent.

Mitkovski testified that he borrowed $2,000 from Keyes. He also denied discussing those notes with Keyes in 1987 (Tr. 109; 144). In rebuttal, Mitkovski denied telling Keyes that someone from the Board might be coming to speak to him about the note; but

did affirm that Keyes *told him* that someone from the Board *had come out to see him*. Mitkovski further testified that Keyes, immediately prior to the 1987 remanded hearing, said:

> "Miro, I'm sorry I had to tell the guy that I only gave you $100. I'm sorry I had to do this to you, but I'm in a lawsuit myself. I cannot jeopardize my case."

Keyes testified that he was in fact sued for $10,000 by the mother of a partner in the Fall of 1987 (Tr. 218-219). He thereafter stated that it might have occurred in the fall of 1986 (Tr. 220). Keyes testified that he had to borrow money in order to settle the lawsuit (Tr. 220-221).

(2) The Note Of Robert ("Mike") Wagner:

Wagner testified that he gave money to Mitkovski sometime in 1983 and, on April 11, 1984, executed a note showing Mitkovski indebted to him with a face value of $5,000. Wagner could not recall *when* he actually gave the money to Mitkovski or *how much* he gave. He did recall that it was between $2,000 and $3,000 and that it was all in cash. Similarly, Wagner could not recall when he prepared the note but recalled that it was typed in his office. About one week before Wagner transferred the money in 1983, Wagner testified that Mitkovski told him that he was going to Yugoslavia; that he had an opportunity to purchase computer chips (apparently in the United States) and desired to sell them in Yugoslavia at a profit.

At the time of the execution of the note, in or about April 1984, Wagner said that Mitkovski told him that he wanted to show that he had borrowed $5,000 from Wagner; that he was involved in a labor dispute; and he needed this money to show that he was borrowing money in order to live.

Mitkovski, according to Wagner, repaid him $2600 or $2700 dollars although he expected to be repaid about $3000 (including interest payments that might be due). Wagner said that Mitkovski repaid him over a long period of time, the last repayment being about 2 years prior to the hearing (apparently in 1987). Rather than being repaid $3000, Wagner said that Mitkovski only paid him about $2600, mostly in cash. Wagner could not recall the size of the payments or their number. He did recall that he wanted repayment of the full $3000; Mitkovski, according to Wagner, said that he had repaid $3000 but Wagner said that he had not.

Wagner testified that he kept account of the repayments on a slip of paper but threw it away about a year before this hearing.

Although Wagner recalled only one check used in the repayment, he admitted that his signature appeared as an endorsement on three checks totalling $800: (a $200 check dated November 1986; a $100 check dated June 1986 and a $500 check dated April 1987). Although he recognized his signature on all three checks, he testified that he could not recall receiving them.

Wagner testified that in May or June of 1987, Mitkovski told him that someone from the Board would come to his house (Tr. 252).

Mitkovski testified that he received $3600 from Wagner in April 1984 in one lump sum; that over a 3-year period, 1985 through 1987, he repaid him a total of $4100. He further testified that the $4100 repayment consisted of $3300 in cash and $800 in checks.

At the time of Mitkovski's receiving the $3600, Mitkovski testified that he told Wagner that he was desperate for money and that he had agreed to the $5000 face value based upon an agreement to repay Wagner

the $3600 with 20 percent interest for 2 years and 7 percent interest thereafter. Consistent with that arrangement, Mitkovski testified that he began repaying Wagner in late 1985 and that on 7 to 8 occasions he gave Wagner money as late as 1987.

Mitkovski further testified that, in 1986, his wife opened a business and he was able to pay Wagner with checks drawn on his wife's business.

Mitkovski denied any discussion with Wagner concerning the notes in 1987.

In rebuttal, Mitkovski denied that he told Wagner that the intent of the note was only to show that he borrowed $5000, but admitted that he told him that he was involved in a labor dispute. He denied telling Wagner that he needed the note to show that he was borrowing money to demonstrate how he lived. Mitkovski testified that he knew Wagner for 10 years and discussed the labor case with him at various stages but did not discuss the backpay proceeding. He testified that when he signed the note, and at all other times, he told Wagner of his financial hardship and that he was without funds. In particular, Mitkovski denied telling Wagner that he needed money to buy computer chips.

(3) The Note Executed By Dale F. Flohr:

Flohr testified that he knew Mitkovski for 10 years. In the winter of 1983-1984, according to Flohr's uncontradicted testimony, he loaned Mitkovski $7500 in exchange for a note for $7,500. Of the $7500, $500 was to be used by Mitkovski for his own purpose, and $1500 was to be used in Mitkovski's attempt to purchase, in Europe, parts for Flohr's Mercedes Benz automobile. Ultimately, $500 of the $1500 was to be used by Mitkovski, and forgiven by Flohr, as traveling expenses.

Flohr testified that it was Mitkovski's idea to prepare the note and that Mitkovski left his tools as collateral for the $7500 loan. About 18 months after the loan (i.e. in the summer of 1985), Mitkovski repaid Flohr $7000 in total satisfaction of the loan (Flohr as above noted, forgave $500 as Mitkovski's traveling expenses).

In or about June 1987, Mitkovski telephoned Flohr and asked him to say, when "somebody called", that Mitkovski had *not* paid back the note. Flohr told him that he would do so. Thereafter Flohr was contacted by a Board agent and made a sworn statement that he had *not* been paid back. Apparently the next day, Flohr telephoned Mitkovski and told him he couldn't live with this statement to the Board, and that he wanted to tell the truth. Mitkovski's answer was that that would be "fine" (Tr. 294).

In fact, the evidence showed, as Mitkovski testified, that the $7,500 note was executed on November 12, 1983 (and thus, if the note was paid back about 18 months later, as Flohr testified, it was paid in the late spring of 1985) and that the note was prepared by Flohr himself. Mitkovski admitted that in May or June 1987, he asked Flohr to say to anyone who asked that the note had not been paid. Further, Mitkovski admits that he was asking Flohr to tell an untruth and that the note had actually been paid in late 1985 or early 1986, in cash (Tr. 118-119).

Mitkovski testified (Tr. 166-167) that he asked Flohr to say that the loan had not been repaid because he had actually repaid Flohr with loans from "others." Mitkovski said that he received these loans from "others" in 1985 and 1986 and did not want to drag them into this proceeding. Thus, if Flohr would testify that the loans had not been repaid, as Mitkovski asked, the names of these other lenders would not be mentioned.

IV.

CONCLUDING FINDINGS AND DISCUSSION:

(a) The Timothy Keyes testimony:

I credit the testimony of Timothy Keyes. I conclude, consistent with his testimony, that he executed a total of $2,000 in notes in favor of Mitkovski and never gave him any money. I further conclude that Mitkovski told him at the execution of the $800 portion of the note, in August 1983, that Mitkovski was trying to show that he had money coming in and that Keyes obliged him by signing the note. I find that he did this out of next-door neighborliness and that there was never a transfer of money either at the time of execution of the $800 portion of the note in August 1983 or at the time of the $1200 portion of the note in 1984. I further credit Keyes that in March 1984, at the execution of the $1200 portion of the note, Mitkovski told him that he wanted to show that he had borrowed additional funds and asked him to sign another note, putting the two loans together. Furthermore, I discredit Mitkovski's denying that he told Keyes that someone from the Board would be coming to speak to him and I further discredit Mitkovski's rebuttal testimony that Keyes told him that someone from the Board had come to see him and that Keyes was "sorry" that he had to tell the Labor Board agent that he only gave him $100. I further do not credit General Counsel's theory that Keyes lied in order to shield his assets because of an impending lawsuit (which Keyes admitted existed).

The basis for my conclusion is not only my observation of Keyes as he testified (his appearance and straightforward testimony impressed me) but I can discover no record reason why, without proof of any possible tampering, a next door neighbor would, answering

a Board inquiry concerning the loan, tell the Board that there was no such loan when that is the fact. There is no basis exposed on this record why Keyes would be untruthful and I regard General Counsel's theory of Keyes' shielding assets because of a pending lawsuit as far-fetched and otherwise unproven.

In short, I conclude, that the $2,000 comprising the two Keyes' notes did not exist; that Mitkovski lied in swearing that the sum was transferred to him; and further lied in denying that he told Keyes that someone from the Board might be coming to talk to him about the notes. Further, I find, that Mitkovski told Keyes, in March, 1984, at the execution of the $1200 part of the notes, that he wanted to show that he had borrowed additional funds from him. I also find that he said the same thing upon the execution of the $800 portion of the note in August of 1983.

(b) The testimony of Robert (Mike) Wagner:

I was not at all impressed with Wagner's veracity. I found it highly difficult to credit Wagner since he could not recall *when* he prepared the $5000 note; he could not remember how much he had loaned Mitkovski in 1983 (sometime before the April 11, 1984 note was executed); and he could not remember *how much* Mitkovski repaid him. The dangers of lending money are well known and have been celebrated (e.g., Polonius in *Hamlet*); and the ordinary run of human beings, especially in a single cash transaction, ordinarily remembers not only how much was lent but certainly how much was repaid. Wagner could remember neither and I discredit the testimony based on such an unhappy memory. In addition, his memory suffered from a further defect; although he recognized the endorsements on three checks given to him by Mitkovski in partial repayment of the loan, he could not actually remember

receiving the checks. When a witness with a memory of such imprecision testifies with particularity that, even before he lent Mitkovski money (in or about 1983), Mitkovski told him that he was going to use the money to buy computer chips, in the face of Mitkovski's denial of such a conversation, I hesitate to credit Wagner on later money transactions. Thus, Wagner could not remember how much less than $3000 he loaned Mitkovski and could not even remember, ultimately, whether it was $2600 or $2700 notwithstanding that he had committed the loan and the repayments to a slip of paper. Further, I cannot believe that he fortuitously threw away the slip of paper a year before this hearing, having maintained it for several years with the loan allegedly not fully repaid. Such conduct does not support his credibility.

On the other hand, certain of Wagner's testimony was consistent with the testimony of Keyes whom I credited. Thus I credited Keyes' testimony, over Mitkovski's denial, that Mitkovski told Keyes that someone from the Board would be coming to speak to him. Wagner testified similarly (Tr. 252) and Mitkovski did not deny such testimony. More important, in the absence of any suggestion of tampering with Wagner, Wagner testified that Mitkovski told him that he wanted a $5000 note even though he borrowed less than $3000, according to Wagner, because he was involved in a labor dispute and needed the money to show that he was borrowing money in order to live (Tr. 242). Since Keyes testified to roughly the same Mitkovski motive (Tr. 205) and since I credited Keyes, I would ordinarily find great difficulty in discrediting the same testimony from another erstwhile friend of Mitkovski. I do not credit Mitkovski's denial (Tr. 351) that he told Wagner that he needed to show that he was borrowing money in order to demonstrate how he lived.

On the other hand, I was impressed with and credit the straightforward and credible Mitkovski testimony that he borrowed $3600 and repaid $4100; and that he received $3600 in one lump sum in cash from Wagner (Tr. 100) at the time of executing the $5,000 note and that he repaid Wagner over a 3-year period commencing in 1985 and ending in 1987 for a total of $4100.

Further, I credit Mitkovski's testimony that the $3600 loan from Wagner was to be accompanied by payment of interest at 20 percent for 2 years. Although Wagner denied this, and although the note, on its face bears only a 7 percent interest rate, I credit Mitkovski on the $3600 loan because of Wagner's repeated and incredible inability to recall, as above noted, the size of the loan, the time of the loan, the amount of the repayments, and the nature of the repayments. It is idle to speculate why Wagner had such a poor memory with regard to almost all elements regarding the money he lent and received and such accurate memories with regard to other matters.

In short, I conclude, crediting Mitkovski, that he did borrow $3600; that he did repay $4100; that the repayments occurred between 1985 and 1987; that, contrary to Mitkovski, however, he did tell Wagner, as he had told Keyes, that he needed to show $5000 as the face amount in order to demonstrate how he lived. I further conclude that, like Keyes, Mitkovski told Wagner in May or June 1987 that a Board Agent would visit him. While it is true that Wagner is a 10-year friend or acquaintance of Mitkovski and has no record motive to tell untruths, I have not credited his testimony in full and have, indeed, discredited his testimony with regard to the amount actually loaned to Mitkovski. While it may be that Mitkovski mentioned computer chips to Wagner and his desire to buy cheaper computer chips in the

United States and sell them in Yugoslavia, I do not credit Wagner's recollection that this Mitkovski statement was said in conjunction with Wagner advancing him money in 1983 as a loan.

(3) [sic, (c)] The testimony of Dale F. Flohr:

There is no dispute with regard to Flohr's credibility since Mitkovski admitted asking Flohr to falsely state to "anyone who asked" (Tr. 117) before the remand hearing of November, 1987, that Mitkovski had not repaid the $7,500 note. Mitkovski admits asking Flohr to tell an "untruth" (Tr. 118-119) because the note had been repaid in late 1985 and early 1986 in cash.

It seems to me that it does not ultimately help Mitkovski's credibility that when Flohr thereafter contacted him and told him he could not live with the lie, Mitkovski told him that he should tell the truth if that was more comfortable for him to do so. I do not credit Mitkovski's testimony that he made this approach to Flohr because of a desire not to involve other lenders. Flohr's truthfulness does not redound to Mitkovski's benefit. What happened here was that Flohr thought better of lying under oath to a federal agent and Mitkovski did not desire to compound his original request with insistence that Flohr continue in his untruthful statement to the NLRB agent.

The Actual Value of the Monies Transferred via the Lenders to Mitkovski in the Backpay Period:

The face value of the loans, as above noted, was stipulated to be $67,850 from eight lenders in 11 notes. Because of the above testimony of Timothy Keyes, the first subtraction is the full $2,000. This leaves the *face* value, with that subtraction, of the notes at $65,850.

The next subtraction is that with regard to the testimony of Wagner. Since I have credited Mitkovski over

Wagner with regard to the actual loan amount, I find that he was lent not $5,000, but only $3600 in 1984. This calls for a further subtraction of a further $1400 and leaves the actual amount of borrowed money at $64,450 rather than $67,850. When the resulting $64,000 in loans is added to the $18,000 of Mitkovski's interim earnings and unemployment compensation in the backpay period, the result is that Mitkovski can account for in excess of $82,000.

I concluded, in the attached SECOND SUPPLEMENTAL DECISION, issued March 11, 1988, (p. 4) that:

> On the basis of $60,000 in loans, and the $18,682 in part-time work, self employment and unemployment compensation, Mitkovski's gross receipts in the 48 months amount to over $78,000.

The above mathematics, with regard to the actual funds available to Mitkovski in the backpay period from loans and other known receipts, is incorrect where it states $78,000. The correct sum, as above noted, should be in excess of $64,000 in loans, and $18,682 in other funds, as above noted, for a total of available cash receipts in the backpay period of about $82,500.

Living Expenses
in the Backpay Period:

Again, as noted in the Second Suplemental Decision, I have made adjustment for the 26-week period (6 months) in which Mitkovski and his family were in Yugoslavia on vacation (p. 4, Second Supplemental Decision). Since it now appears, as discussed below, that, the apparent Court of Appeals finding notwithstanding, based on both General Counsel's prior argument and now Respondent's acknowledgement in its brief that Mitkovski monthly expenses were not $2,000/month but merely "close to" $2000/month, there should be an

adjustment with regard to Mitkovski's back-pay period expenses. I had originally found that, for the total of 6 months, he should be the beneficiary of about $1000 a month of non-expenses (Second Supplemental Decision, p. 5) and therefore his living expenses should have totaled about $90,000 to $92,000, rather than $96,000.

In the above rendition of facts, I have been constrained to depart from what I regarded to be the law of the case of Mitkovski's expenses ($2,000 a month) because Respondent has, itself, not only raised the issue again but, apparently agreeing with General Counsel's prior argument, has corrected or attempted to correct the basis on which the $2,000 per month figure was arrived at by me, by the Board, and by the United States Court of Appeals. While it is true that the Court used that figure ($2,000/month) and, indeed, suggested that the expenses approached $100,000 in the backpay period, Respondent has now accurately and correctly called our attention to what Mitkovski *actually testified to:* that his expenses were "close to" $2,000. In the absence of a suggestion that close to means "more than" or "the equivalent of", and in view of the fact that I conclude that common speech requires that "close to" means *somewhat less than*, I suggested that "close to" might be reasonably fixed at 90 percent. If so, Mitkovski's monthly expenses would be $1800 per month rather than $2,000 per month and the 48 months expense total would be (48 months times $1800 per month) about $86,400. The difference between $86,400 of expenses and $82,500 of available funds is less than $4000. When this $4000 figure is spread over a 4-year period, the difference between expenses and available funds is about $1000 a year. Even if "close to" $2,000 per month is actually 95 percent rather than 90 percent, the resulting 48-month backpay expenses of Mitkovski would be $91,200 rather than $86,400. In that event,

there would be somewhat less than a $9,000 difference between Mitkovski's expenses and available funds in the 48-month period.

In either event, contrary to the computations in the Second Supplemental Decision of March 11, 1988 (p. 5) the "short-fall" between Mitkovski's *available funds* and *expenses* in the 4-year backpay period is not, according to original calculation, in excess of $17,300; rather it is, I propose, a maximum of $9,000 and a minimum of $4,000. Again, this takes into account a resolution of the mathematical problem appearing on the face of all decisions relating to the 6-month period that the Mitkovski family was in Yugoslavia during the backpay period. In addition, I find that the actual cash value of the loans is in excess of $64,000 rather than the $67,850 stipulated face value. My prior finding in the Second Supplemental Decision is thus raised to show loans of in excess of $64,000 rather than $60,000. Mitkovski family expenses in the 48-month backpay period are now less than $87,000 rather than $96,000 as previously computed.

In mathematical terms, therefore, and crediting witnesses called by Respondent, all partially or wholly unfavorable to Mitkovski, the difference between the cash value of loans to Mitkovski, previously found, and the actual loans revealed in this reopened hearing is $64,000, rather than $60,000. Since the amount of interim earnings and other cash available to Mitkovski in the backpay period is not contested, the end result is that the total of funds available to Mitkovski in the backpay period was not $78,000 as previously suggested; rather, it was in excess of $82,000 ($64,000 plus $18,682).

I conclude, therefore that as a result of this reopened hearing (dealing with alleged false and perjured testimony concerning, *inter alia*, loans) and the testimony

gained therefrom, Mitkovski had the benefit of more money in the backpay period than previously found; and that the "short fall" of between $4000 (if the evidence is viewed favorably to Mitkovski) or less than $9,000 (if testimony and estimates unfavorable to Mitkovski are credited) does not necessarily suggest that Mitkovski supported himself and his family in the backpay period by undisclosed interim earnings. I made the finding in the attached Second Supplemental Decision that with available funds of $78,000, with a resulting short fall of $12,000 to $18,000 over the 4-year period (Second Supplemental Decision pp. 6-7) Respondent failed to prove concealed interim earnings, much less intentional concealed interim earnings. Since I found that this figure of $78,000 adequately explained how he lived in the 48-month backpay period, I must conclude, *a fortiori*, that with present proof that the available funds exceeded $82,000 (rather than $78,000) and with expenses of about $90,000 (rather than $96,000 as previously found), the evidence of both loans and expenses, exposed in this proceeding, is even more favorable to Mitkovski. The disparity, standing alone, fails to support an inference of intentionally concealed interim earnings or that Mitkovski failed to make a reasonable effort to seek interim employment.

Mitkovski's Untruthful Testimony
and "Subornation of Perjury":

I have found, with regard to the testimony of both Keyes and Wagner that Mitkovski untruthfully denied telling them that, in executing the notes, he was trying to show that he had money coming in; and that he needed to show money coming in in order to show how he lived during the backpay period. It is also undenied that Mitkovski intentionally solicited a purposeful untruth from his friend, Dale Flohr, in asking Flohr to lie

to the Board (which Mitkovski by this time must have known would have been under oath) in saying that the $7500 Flohr loan had not been repaid (in 1987) whereas it had been repaid by the late spring or summer of 1985.[5] Whether Mitkovski's actions toward Flohr are called "subornation of perjury" or whether or not they technically meet that legal standard is not entirely relevant. He admits asking Flohr to untruthfully testify. This seriously undermines Mitkovski's credibility and veracity. Similarly, I have been unable to find why Mitkovski's erstwhile friend and neighbor, Keyes, would gratuitously lie to the Board with regard to transferring $2,000 in loans to Mitovski. I have found that Mitovski lied in suggesting that he had actually received $2,000 from Timothy Keyes.

RESPONDENT'S ARGUMENTS:

Respondent argues in brief (*passim.*) that the only inference to be derived from Mitkovski's repeated serious untruthfulness, with regard both to the loans (the Timothy Keyes "loan") and his request to Flohr to lie to the Board concerning repayment of the $7500 loan should be to undermine Mitkovski's testimony (which I have previously credited) concerning his search for work; and with such undermining, that I should conclude that there was no such search for interim employment during the backpay period; and therefore, ultimately, conclude that Mitkovski was not entitled to backpay since he did not seek, at any time during the backpay, to mitigate the gross backpay obligation of Respondent.

The cornerstone of Respondent's argument is that Mitkovski's testimony in the 1987 remanded hearing

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5 **Mitovski testified (Tr. 118-119) that he repaid Flohr in 1985 and early 1986, in cash. I found that the note was repaid in or about the late spring or summer of 1985.**

concerning his search for interim employment was all uncorroborated; and that in view of testimony in this reopened hearing of Mitkovski's own lying about some of the loans (Keyes) and his suborning of Flohr, I should reconsider the credibility resolution, derived from testimony in the 1987 hearing in favor of Mitkovski's having reasonably searched for work or, more accurately, that *Respondent* failed to prove that Mitkovski did not make reasonable efforts. The problem with this argument is that I did not credit Mitkovski on the basis of his "uncorroborated" testimony notwithstanding that Mitkovski was the only witness in support of his alleged search for interim employment.

The ultimate issue was, it is true, whether Mitkovski's testimony concerning his search for employment in the backpay period should be believed. As the accompanying Second Supplemental Decision shows, with perhaps too great detail, I based my findings and conclusions, crediting Mitkovski's version, particularly on the fact that, where Mitkovski named names and places visited in searching for work during the backpay period, and where Respondent had a full and adequate opportunity to challenge and contradict Mitkovski, it consistently failed to do so. It is unnecessary to repeat, in detail, that Mitkovski, after unlawful discharge, immediately sought employment from an employer who, promising a pay raise, previously had begged him to quit his job with Respondent and come to work for Art Moran Fiat/Lancia (Second Supplemental Decision, p. 9). Respondent never challenged that testimony. Moreover, Respondent never challenged the Mitkovski testimony of other Fiat dealerships at which he vainly sought employment which were sufficiently identified both as to time and person (Op. cit., pp. 8 *et seq.*). Furthermore, Mitkovski's testimony clearly showed, as far as I was concerned, that at least three of the five places where

he applied for work, there was a "blackball" operating against him. This not only showed Mitkovski's good faith efforts, particularly in the first half of the four-year backpay period, in his seeking interim employment; it also distinguished certain Court precedent (op. cit., p. 23) with regard to showings of relatively few attempts at gaining work: for there was a job, on this record, waiting for Mitkovski at Art Moran Fiat/Lancia and he was turned down because he was blackballed. Mitkovski's obligation was to make reasonable attempts at securing interim employment. I conclude that Respondent failed in its burden to show that he did not do so.

I was extremely concerned with regard to other attempts to secure evidence, in the remanded hearing of 1987, to determine whether Mitkovski, particularly in the *last* 2 years of the backpay period, sought interim employment. My efforts in that regard were blocked by Respondent. Respondent saw fit, on its own behalf, to explicitly refrain from questioning Mitkovski with regard to those efforts. Respondent failed to meet its burden of proof, under these circumstances, to show that Mitkovski had not made an adequate search for interim employment during the backpay period.

The question then remains as to what lies Mitkovski told in the 1987 remanded hearing (and in this 1988 reopening) and the effect of his subornation of perjury with respect to the Dale Flohr repayment. The evidence in this reopened hearing shows that Mitkovski lied with regard to the value of the Keyes loan, particularly to show that he had loans in order to show the source of his livelihood. Respondent seeks an inference that the purpose of these lies was to mask interim earnings.

The first problem with regard to this is that Respondent seeks an inference of interim earnings when there

is no evidence in support of such inference. Mitkovski's lies with regard to the Keyes' loan (and even perhaps the Wagner loan) and his testimony with regard to the $2000 per month backpay period expenses, it seems to me, all derived from the same source. That source is Mitkovski's "puffing." Consistent with both Respondent's present brief, and General Counsel's erstwhile argument, showing that Mitkovski had expenses of "close to" $2000 per month, I conclude that his expenses were actually less than that; and that he "puffed" his actual expenses to "close to" $2000 per month on the belief that any future remedial compensation (backpay) that he received through the Labor Board might well be a variable determined by his living expenses, as it might be in certain civil actions. I conclude that his request to his neighbors and friends, Timothy Keyes and "Mike" Wagner, for the execution of fictitious loans, or loans with high face values, derive from the same source: Mitkovski wanted to show that he was borrowing money to live on. The fictitious and excessive amounts of the loans would support a claim which Respondent would have to meet in backpay. I conclude that the request to show high face values for nonexistent or lesser loans and to show that he was living off this money gave Mitkovski the opportunity to create large expenses which, he thought, Respondent would have to satisfy in backpay. Hence, his puffing of "close to" $2000/month in living expenses.

There is credited testimony herein to suggest that Mitkovski was not performing work of a private nature which resulted in undisclosed interim earnings. For instance Flohr testified that at the time of the execution of the November 12, 1983 note, Mitkovski left his tools as collateral for the note (Tr. 281-282) and a mechanic needs tools for work. While he might have worked with borrowed tools, there is no question that Flohr returned

the note to Mitkovski upon his repayment of the note 18 months later. The facts with regard to the repayment of the Flohr note are uncontradicted: the note was repaid well *outside* the backpay period. If the notes were repaid outside the backpay period, it is as likely as not that the funds supporting such payment were earned outside the backpay period rather than prior thereto. In any case, the repayment well outside the backpay period is not suggestive of, nor does it lead to the inference Respondent suggests, that the funds to pay off the note were derived from earnings within the backpay period. The burden of proof is on Respondent. It was not met.[6]

Similarly, Wagner testified that Mitkovski started repaying him in late 1985, continuing into 1986 and 1987 according to Mitkovski's testimony (Tr. 161-162). Wagner's testimony does not differ. He only failed to recall when the repayments were made, the size of the repayments, and the nature of the repayments (whether in cash or in checks) nor how many checks were

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6 **In this regard, there was no testimony or proof of *any* unreported earnings in the backpay period. There are no tax returns because Mitkovski never filed a tax return in the backpay period. This is as consistent with his not having unreported interim earnings as it is with his failing to disclose earnings. More important, however, the Flohr loan was repaid well *outside* the backpay period and there is no suggestion that the Flohr note was paid *within* the backpay period. Had the latter occurred, the inference might follow that Mitkovski's funds therefore were derived from earnings within the backpay period. Similarly, if the Flohr note were repaid *immediately* after the termination of the backpay period, there might still be an inference, albeit a weaker inference, that the funds supporting such a repayment were created during the backpay period. In the instant case, however, with the backpay period ending in September, 1984, repayment occurred in the late spring or summer of 1985 (Mitkovski places repayment in "late 1985, early 1986,") (Tr. 118-119) and there is therefore no evidentiary support to suggest that a repayment made at such a comparative late date was derived from unreported earnings within the backpay period.**

received, but he testified that the dates of the repayments were kept on a slip of paper (Tr. 262) which he threw away about a year before this hearing notwithstanding that he had kept the slip for a period of years. What does appear in Wagner's testimony, again consistent with Mitkovski's, is that the repayments by check were in June and November 1986 and April 1987 (Tr. 266-267). This evidence is not consistent with Respondent's suggested inference that the repayments of the Wagner notes were derived from unreported interim earnings earned during the 1980-1984 backpay period. As in the case of the Flohr note, the repayments are more consistent with funds created after the conclusion of the backpay period.

In short, I conclude that Mitkovski's lies with regard to the Keyes notes ($2000) and his testimony with regard to expenses of "close to" $2000 I regard as derived from the necessity to show "damages" notwithstanding that they reflect adversely on Mitkovski's credibility and veracity; that there is no *evidence* whatsoever that Mitkovski enjoyed any unreported earnings in the backpay period; that the *evidence* with regard to Mitkovski's tools and the repayment of notes outside the backpay period is not suggestive of hidden interim earnings.

I also conclude that Mitkovski's clear suborning of perjury (and it appears to be nothing less than that) of Dale Flohr in 1987 to report that the $7500 Flohr loan had not been repaid, was subornation of an immaterial fact. Since the loans were not shown to have been repaid from funds derived during the backpay period, the subornation is not material to the issues before us. Rather, Mitkovski's subornation of Flohr is consistent with the conclusion, above, that Mitkovski desired to

show *continued* large debts in order to bolster (what he believed to be) a theory justifying large remedial compensation through the Board in the form of backpay: the larger the outstanding debts accrued during the backpay period, the larger the remedial monetary obligation of Respondent that the Board would seek to enforce.

The fact that Mitkovski compounded his misunderstanding of the Board's remedial functions on backpay with his subornation of a friend (Flohr) does not redound to Mitkovski's credit. He is clearly no choir boy and appeared to me, in some ways, a facile witness and a slippery character; in the present argot, a finagler and a *gonif*. He also tells lies and wants others to lie for him. But that does not put him outside the protection of the Act.[7]

In this regard, it is clear that both the parties' citation of Board authority such as *American Navigation Co.*, 268 NLRB 426 (1983) and *Ad Art, Inc.*, 280 NLRB 985 (1986) is of little help since the cases are irrelevant. Those cases deal with the problem of what effect intentionally concealed interim earnings have on the Board's backpay remedy. Cf. *Frank Moscoli Construction Co.*, 289 NLRB No. 147 (1988). As the Board noted in *Ad Art Inc.*, *supra*, ftn. 2, the Board rule in *American Navigation Co.*, *supra*, is that the Board should deny backpay only for

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[7] **The Board, with Court of Appeals approval, has recently and forcefully reminded its judges that the Board's remedies do not ordinarily include the punishment of discriminatees who are liars in its proceedings by withholding reinstatement and cutting off backpay. *Owens-Illinois, Inc.*, 290 NLRB No. 155 (1988); enf'd by memorandum ___ F.2d ___ (C.A. 3, 3/17/89); petition for rehearing *en banc*, denied (C.A. 3, 4/10/89). Should the board determine that Mitkovski's testimony and activities should be scrutinized by the Department of Justice, it has the power to refer the record. *Omnix International Corp.*, 289 NLRB No. 101 (1988).**

those calendar quarters in which a discriminatee intentionally concealed interim employment from the Board. In *Ad Art Inc.*, *supra*, the Board reaffirmed *American Navigation*, and noted that it would find that, in a case where the discriminatee's dishonesty made it impossible to calculate an accurate figure for backpay in any particular quarter, backpay, in all quarters where the calculation of an accurate figure could not be made, would be deleted. The concurring opinion of Chairman Stephens (then Member Stephens) emphasized that Board precedent "... does not license a judge — or the Board to deny all backpay to a discriminatee because he lied about a particular matter or even was generally unworthy of belief." Such a rule, according to Chairman Stephens, would violate the rule of *American Navigation Co.*, *supra*, and would not "... accord with rational standards of adjudication."

As above noted, however, these cases are not relevant to the instant dispute because in those cases, there was proof that the discriminatee intentionally failed to disclose interim earnings; whereas, in the instant case, that is the very question to be decided. Thus, the above cited authority is irrelevant and, if applied herein, would *beg* the very question presented herein: whether by inference or otherwise the Board should conclude that Mitkovski intentionally failed to disclose interim earnings in the backpay period. Those authorities deal only with the remedial effect of undisclosed interim earnings rather than *whether* there were undisclosed earnings.

Consistent, however, with *Ad Art, Inc.*, *supra*, and particularly Chairman Stephens' concurring opinion, I conclude that on the basis of testimony and other evidence adduced in this reopened, remanded hearing, that

Mitkovski's lies with regard to (1) the existence of a loan and the receipt of funds in exchange for a note (Keyes); (2) his subornation of perjury from his friend Dale Flohr with regard to repayment of the Flohr loan, and (3) his lie with respect to whether he told Keyes that a Board agent or someone else might ask him about the loans, all demonstrate that in important respects, Mitkovski is a liar and a suborner of perjury. I have found that his lies with respect to the face value of the loans as well as his living expenses were part of a design to "puff" the amount of his damages, looking forward to being recompensed from Respondent through the Board on the basis of high expenses and high loans. I have found that his subornation of Flohr, his friend, related to repayment outside the backpay period and therefore constituted subornation on an immaterial element. I find that repayment outside the backpay period does not demonstrate that the funds therefor were derived from intentionally hidden, unreported interim earnings within the backpay period; and that any inflation of the amount of the Wagner loan, even if I were to credit Wagner, would place Mitkovski's untruthfulness in the same category as when he lied as to the transfer of funds under the Keyes note: in order to puff up his loans and expenses during the backpay period in order to get greater backpay through the Board.

Again, the evidence adduced both in the 1987 remanded hearing and in this 1989 reopened hearing does not show or even suggest that Mitkovski had unreported earnings in the backpay period. Rather the evidence adduced herein shows that he was a liar, a finagler and a suborner of perjury on immaterial elements. His lies and subornation however, without some proof of some unreported interim earnings, do not sup-

port an inference that he had unreported earnings in the backpay period.

Nor do I conclude, as Respondent would have me, that his various lies and subornation are sufficient to undermine his testimony with regard to his search for interim employment. As above noted, Mitkovski named names of places he sought employment and Respondent failed to contradict Mitkovski's testimony. Where there was an attempt to elicit from Mitkovski *where else* he sought work in the backpay period, Respondent successfully blocked the attempt to gain such testimony and failed to adduce its own evidence of Mitkovski's failure to seek interim employment during the backpay period. Under such circumstances, I do not infer, from Mitkovski's perhaps periodic untruthfulness and venal acts that the evidence of where Mitkovski actually sought employment (or where Respondent blocked the eliciting of such evidence) should be disregarded in favor of an inference of unreported interim earnings or failure to seek interim employment derived from untruthfulness. To do so would be to substitute an untenable inference in the face of facts which Respondent intentionally failed to disprove in limiting its backpay liability. Respondent has thus failed to prove the existence of unreported interim earnings, the absence of attempts to seek interim employment, or the General Counsel's engaging in a conspiracy to cover-up the above allegations. Respondent has failed to support its burden of proof on these points.

Consistent with the Board's Remanded Order in this reopened hearing, therefore, I am constrained to reaffirm the order I issued in my Recommended Decision

of March 11, 1988 which is attached hereto and expressly included by reference herein.[8]

Dated, Washington, DC, July 18, 1989

/s/ Robert W. Leiner
Administrative Law Judge

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[8] **There is a complete failure of proof that any Regional NLRB personnel or Washington NLRB personnel engaged in a conspiracy to block or cover-up Mitkovski's activities. Nor are accusations by Regional personnel of a lack of faith in Mitkovski's veracity a substitute for proof of undisclosed interim earnings. Respondent's accusations are without merit.**

SECOND SUPPLEMENTAL DECISION *(ON REMAND)*

(Before the National Labor Relations Board —
Division of Judges)
(Dated March 11, 1988)

JD-47-88
Detroit, MI

(OVERSEAS MOTORS, INC., Respondent, and MIROLJUB MITKOVSKI, An Individual, Charging Party — Cases 7-CA-18251; 7-CA-18355; 7-CA-18477)

STATEMENT OF THE CASE

ROBERT W. LEINER: Administrative Law Judge: On 19 November 1985, the National Labor Relations Board issued its Supplemental Decision and Order, 277 NLRB 552 (1985), wherein it adopted my finding that the Charging Party, Miroljub Mitkovski, was entitled to backpay in the amount of $93,648.73, plus interest. Subsequently, the Board petitioned the United States Court of Appeals for the Sixth Circuit for enforcement of its Order.

On 11 May 1987, the Court denied enforcement of the Board's Order and remanded the case to the Board (__ F.2d __, 125 LRRM 2361 (1987)). The Court found that "the ALJ impermissibly restricted Overseas' cross examination of Mitkovski regarding his interim earnings, thereby depriving Overseas of a fair hearing." The Court also noted, citing *NLRB* v. *Pugh & Barr, Inc.* 207 F.2d 409 (C.A. 4 1953), enforcement granted after remand, 231 F.2d 558 (C.A. 4, 1956), that, in the absence of "special circumstances, the large discrepancy, between Mitkovski's reported interim earnings and what we *[sic]* would have earned had he not been discharged, suggested that he had not made reasonable efforts to find interim employment if his reported earnings were, in

fact, accurate. The Court remanded the case to the Board for a further evidentiary hearing on these issues.

On 11 August 1987, the Board accepted the Court's remand and on 29 September, 1987, ordered the proceeding remanded to the undersigned to reopen the record, to provide a further hearing in accordance with the Court's opinion, and to prepare a Second Supplemental Decision containing findings of fact, conclusions of law, and recommendations with respect to the issues on remand.[1]

On 16 October, 1987, I issued a Notice for a hearing to commence on 30 November 1987 on the issues remanded by the Court of Appeals via the Board to me.

Pursuant to the above Notice, a hearing was held on this remand on 30 November and 1 December 1987, in Detroit, Michigan wherein all parties were represented by counsel who enjoyed full opportunity to introduce evidence, to examine and cross examine witnesses, to argue orally on the record and to submit post-hearing briefs. Subsequent to the close of the hearing, General Counsel and Respondent submitted timely briefs which have been carefully considered.

Based on the record of all supplementary proceedings as a whole, including my observation of the witnesses and their demeanor as they testified, and upon consideration of the post-hearing briefs, I make the following:

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[1] **Respondent's requests for a different administrative law judge to preside at the hearing and for discovery in advance of the hearing were denied by the Board. See, generally, G.C. Exh. 1(p) in evidence. Similarly, General Counsel's 9 October 1987 motion to consolidate the above-captioned cases with a Supplemental Backpay Specification issued by the Regional Director, Region 7, on 19 September, 1986, was denied by the undersigned and, upon appeal to the Board, was denied by the Board on 25 November, 1987 (G.C.'s Exh. 1(z)).**

FINDINGS AND CONCLUSIONS

I.

THE ISSUES

As above noted, the purpose of the remanded was *inter alia,* to permit Respondent further cross-examination of Mitkovski regarding his interim earnings and to show his failure to make good faith efforts to find interim employment. Respondent was afforded an opportunity to explore the apparent large discrepancy between Mitkovski's reported interim earnings and what the Board and Court found he would have earned had he not been discharged. In addition, at least for purposes of discovering whether Mitkovski had failed to disclose interim earnings, Respondent was afforded full opportunity to inquire into the sources of funds by which Mitkovski supported himself and his family during the backpay period.

Prior to, and again at, the hearing, the General Counsel moved to amend the backpay specification and/or made an offer of proof with the ultimate aim of reducing the amount of Mitkovski's monthly living expenses during the backpay period. In particular, General Counsel offered to prove that, contrary to Mitkovski's testimony in the original backpay proceeding, Mitkovski's monthly expenses were not $2,000 per month, but only about $1,300 per month. The Court of Appeals had found, on the basis of Mltkovski's testimony, that his monthly expenses during the backpay period were approximately $2,000 per month. The Court observed that since the backpay period was 48 months, his expenses would necessarily have totaled about $96,000. Since the Board accepted and acquiesced in the Court's decision, nothing in the Board's remand, or in its discussion in the remand order, demonstrated any

inconsistency or dispute by the Board with the Court of Appeals finding on that monthly figure. In view of the Court of Appeals finding, and in view of the limited nature of the issues remanded to me, I necessarily denied General Counsel's offer of proof to show lesser monthly expenses than had been found by the Court of Appeals. On the other hand, however, the General Counsel has shown, and Respondent has not disputed the fact, that there appears to be an error in the Court's finding, by extension in the 48-month period, of $96,000 total expenses based upon the $2,000 monthly expenses. Mitkovski was out of the country for a total of about 6 months of the 48-month backpay period. During that foreign time, excluded from General Counsel's gross backpay computation, his daily *living* expenses were payed for by his family or his wife's family. Thus, while his mortgage expenses and household utility burdens in the United States might have continued, Mitkovski's family's living expenses, while it was abroad for this period, totalling 6 months, cannot reasonably reach the $2,000 figure. Therefore the $2,000 per month expense figure appears to me to be in error for those limited periods. The computational error, again is apparent since neither the Board nor the Court took into account that the 6 months was eliminated from the gross backpay period. It cannot therefore reasonably be included for purposes of 48 months of expenses. Certainly not the total expenses, as above noted, other than the continued mortgage and similar expenses of the Mitkovski household in the United States. They would continue regardless that Mitkovski's in-laws and family paid for his expenses while he and his family were in Yugoslavia for 6 months.

Thus, the principal issues at the hearing were (1) Mitkovski's interim earnings; (2) his efforts to seek interim employment; and (3) the sources and extent of

Mitkovski's funds during the backpay period. The resolution of these issues would also answer the question whether, as Respondent urges, Mitkovski had unreported interim earnings; and the question whether an explanation or "special circumstances" existed which might explain the discrepancy between Mitkovski's reported interim earnings and what he would have earned had he not been discharged.

II.

THE DISCREPANCY BETWEEN MITKOVSKI'S INTERIM EARNINGS IN THE BACKPAY PERIOD AND THE APPARENT $96,000 EXPENSES INCURRED BY HIM IN THE SAME PERIOD (48 MONTHS AT $2,000 PER MONTH):

At the hearing, over General Counsel's repeated objection (and repeated again in his brief) I ruled that both the law of the case and the limited subjects remanded required that all parties be bound by the Court's finding, that Mitkovski, on his own testimony, had monthly expenditures of $2,000 per month.[2] In addition, the law of the case demanded, and I ruled, that the parties were bound by the finding of the Court of Appeals (slip op., at p. 6) that in the backpay period, Mitkovski's interim earnings, including part-time work at Lincoln Park Motors, Inc., and from self-employment during the backpay period, totaled $14,621.16; and that he received unemployment compensation of an additional $4,061. Thus, the most that he could have shown as interim income and unemployment compensation during the backpay period was $18,682. As above noted, the Court multiplied the total number of months (48) in the backpay period by the $2,000 per month figure of

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[2] **I thus rejected General Counsel's offer to prove that for the entire 48-month backpay period Mitkovski's actual expenses, to be derived from testimony proffered at the remanded hearing, would be substantially less than $2,000 per month.**

Mitkovski's expenses (according to Mitkovski's own testimony at the prior backpay hearing) and concluded that Mitkovski's expenses were $96,000 (Court, sl. op. p. 7).

The record shows, and Respondent apparently concedes (Respondent's brief, p. 25) that seven persons made loans of $60,000 to Mitkovski in the backpay period. On the basis of the $60,000 in loans, and the $18,682 in part-time work, self employment and unemployment compensation, Mitkovski gross receipts in the 48 months amount to over $78,000.

In addition, at the hearing, as above noted, General Counsel argued, and I agree, that in the 48-month gross backpay period, in estimating the gross backpay, General Counsel *deleted* from the gross backpay period four occasions totaling approximately 26 weeks (i.e., six months), that Mitkovski and family spent in Yugoslavia mostly on vacation. On all such occasions, Mitkovski's expenses were paid by his family and by relatives of his wife. Contrary to General Counsel's argument, however, the deduction for such a period of foreign residence is not to be computed at the rate of $2,000 per month since Mitkovski's home in the United States was still subject to the same mortgage and the same expenses attendant upon home ownership. Thus, where General Counsel argues that there should be an arithematical deduction of $12,000 for the six months that Mitkovski and family spent in Yugoslavia (Tr. 379), I do not believe that that is the correct figure.[3]

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[3] **If that deduction were made, the Mitkovskis' 48-month backpay expenses would be $84,000 rather than the Court-remanded $96,000. General Counsel's offer of proof showed that Mitkovski's household expenses were $700 per month including insurance on the house and taxes. This, together with other expenditures, would result in an alleged total monthly outflow of only $1,300 per month rather than $2,00 per month. As above noted, I rejected this offer of proof.**

There is an absence of proof as to what Mitkovski's expenses were in the aggregate of 6 months in which he and his family were in Yugoslavia, which period was excluded by General Counsel in the computation of gross backpay in the backpay specification. Although on the basis of this record, I cannot make a finding on what the diminution would be, it is evident that it might well approach a $1,000 per month. In short, the Mitkovski expenses would not be $96,000 in the 48-month backpay period but closer to $90,000 (rather than the $84,000 that General Counsel suggests).

Respondent argues that, even granting the $60,000 in loans and the $18,682 in interim earnings and unemployment compensation, there is still a "short fall" of approximately $17,318 ($96,000-$78,682) which Mitkovski cannot account for (Respondent's brief, p. 25). Respondent urges that this "short fall," necessarily constitutes concealment of interim earnings; that such concealment is willful; and that it should result in the denial of backpay for all quarters in which the concealment was found. Since the concealment would be spread over all quarters of the backpay period, Respondent argues that there should be no backpay. See *American Navigation Co.*, 268 NLRB 426 (1983). Cf. *Great Plains Beef Co.*, 255 NLRB 1410 (1981) and *M. J. McCarthy Motor Sales Co.*, 147 NLRB 605 (1964). See Also *Flight Chief, Inc.*, 246 NLRB 407 (1979) and *Big Tree Industrial Gas*, 263 NLRB 1189 (1982). Since I conclude, contrary to Respondent's argument, that there is no credible evidence that Mitkovski concealed interim earnings, I conclude that the above cited cases have no application; and that despite Mitkovski's failure to keep records, he is eligible for backpay.

Accepting the Court's $96,000 figure for expenses in the 48-month backpay period, Mitkovski had about

$78,500 accounted for. The short fall of about $17,500, alluded to by Respondent, amounts to an average of about $4500 per year in the backpay period. If the Court of Appeals figure is reduced to approximately $90,000 (by the inclusions of the 6 months in which Mitkovski and his family were in Yugoslavia, a diminution of the $2,000 per month expenses to about $1,000 a month, thus resulting in $90,000 in expenses rather than approximately $96,000) the "short fall" ($12,000) would be under $300 per month rather than the $375 per month which would be the case if the short fall approached $18,000 for the 48-month period. In either event, I would find that there was no credible evidence on this record to demonstrate the existence of a *concealment* of interim earnings. This would be true whether the "short fall" were around $17,500 based solely upon a mathematical extension of Mitkovski's testimony of $2,000 per month expenses or whether, considering the mathematical error inherent in the exclusion of the 6 months from the actual gross back pay period, the actual "short fall" was about $12,000 or $13,000.

The above cited cases have no application since they were distinguishable. In those cases, there was demonstrated an *intentional failure* to report interim earnings and a resulting abuse of the Board's processes. There is no such evidence here. Errors in estimation do not constitute concealment, much less intentional concealment.

Indeed, the evidence of the source of Mitkovski's funds appears to answer the Court of Appeals' observation on the disparity between expenses and income ("there is the suggestion that Mitkovski's *claimed* loans of $70,000 account for the discrepancy between his income and his expenditures." Court of Appeals sl. op., P. 6) and demonstrates not only the existence of the

loans, but proof of them in writing. More important, however the existence of the actual loans, in my opinion, is also a step in the solution of the further issue whether Mitkovski's testimony with regard to a search for interim employment is to be credited.

Thus, consistent with the first basic remanded issue (the impermissible restriction on Overseas' cross-examination regarding Mitkovski's interim earnings), I conclude that the evidence affirmatively shows that Mitkovski supported his family in the backpay period not only on the scanty interim earnings based upon employment and self-employment (together with unemployment compensation) but on the $60,000 in loans. This showing of $60,000 in loans demonstrates to me that in the absence of evidence to the contrary, Respondent has failed to prove concealed interim earnings, much less intentionally concealed interim earnings, and supports Mitkovski's credibility both in this regard and with regard to the search for interim employment, the second remanded issue.[4]

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[4] The Court was also concerned (Court sl. op., p. 6) with the problems of income resulting from MItkovski's relationship to a wine-importing company and his four trips to Yugoslavia. As in the first hearing, nothing was developed in the second hearing to indicate that Mitkovski had any earnings from the wine-importing company (Overseas International Co.). I regard the wine-importing company's payment of his transportation to and from Yugoslavia (to discover the possibility of developing a business of importing Yugoslavian spirits into the United States) not to be income to Mitkovski; rather, the wine-importing company picked up the transportation expense of its inquiry. Thus, the uncontradicted testimony is that with regard to his 5-week trip to Yugoslavia in August 1981, with all four members of his family, he had no recollection of who paid for the tickets (Tr. 331). As a matter of the burden of proof, there was not proof that Mitkovski paid for the tickets or an inference of his hiding the source of funds used for payment thereof.

In the second trip, for two weeks in June, 1982, again with all four members of his family, Mitkovski's ticket was paid by Overseas Inter-

(*concluded on page A-68*)

The evidence of a "short fall" of $12,000 to $18,000 over a 4-year period standing alone fails to support an inference of intentionally concealed interim earnings.

III.

MITKOVSKI'S INTERIM EMPLOYMENT
AND SEARCH FOR INTERIM EMPLOYMENT

Mitkovski, at age 22, came to the United States from Yugoslavia in or about 1976 (Tr. 406) and settled in Michigan. He had been trained as a mechanic in Yugoslavia and had finished his vocational education, solely on Fiat and Lancia cars, at the age of 18. He worked for a short time at a Chevrolet dealership as a "prep man" and not as a mechanic: he greased, oiled and washed cars in preparation for new car sales. In 1976 he was employed by Overseas Motors, Inc. as a mechanic and, as the evidence in the underlying unfair labor practice hearing and in the first backpay hearing disclosed, he was a top-rated mechanic in terms of pay and skills. Overseas Motors is located about 7 miles and 10-12 minutes by car from Mitkovski's home. At the time of discharge he was about 26; at the time of the second backpay hearing, he was 33 years of age.

He got his job at Overseas Motors through his friend, mechanic Rudy Vuzicevic, who took him to Overseas Motors and introduced him to the employer, a Fiat/Lancia new car dealer. Mitkovski's training, as above noted, solely on Fiat/Lancia, resulted in his work,

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(*continued from page A-67*)

national Co., the wine importing company. His wife's and children's tickets was paid for by her father (Tr. 331-334). In the third trip, 21 November 1982, lasting 18 weeks, all four tickets were paid for by the father and father-in-law (Tr. 33). In the fourth trip, July 1984, for four days, where Mitkovski traveled alone, the ticket was the "free" ticket provided by Yugoslav airlines, for whom he never worked (Tr. 338), and which was apparently in recompense for Mitkovski's promotional work on a Yugoslav-American TV show in Detroit in the period 1976-1979 for which Mitkovski received no pay.

at Overseas Motors 90 percent on Fiats and Lancias. The 10 percent balance was on foreign cars but no American cars. Thus the evidence is uncontradicted that virtually 100 percent of his work was on foreign cars. He did everything mechanical except body work.

He knew of only five of the six (6) other Fiat/Lancia dealerships in the greater Metropolitan Detroit area. He began looking for work at five of the six dealerships 2 days after being unlawfully discharged. Mitkovski never sought employment working on American cars because of the different motors, transmissions and the altogether different "ball game". During the backpay period, he sought employment at two dealerships servicing Japanese cars but, upon his affirming that he had no experience on Japanese cars, he was turned down.

1. Overseas Imported Cars Of Ann Arbor, Inc.:

Mitkovski testified that he sought employment at Overseas Imported Cars in October, November and December 1980 and again in or about January 1981. In his December visit, the representative to who he spoke said; "Oh, you — no job. Ask me next month")Tr. 164-165). In the four further times that he visited Overseas Imported Cars of Ann Arbor, he asked for employment from two different persons and never learned the name of either. Moreover there is no proof that either of them was in a position to hire Mitkovski. Mitkovski testified that he got tired of going there and thereafter telephoned Overseas Imported Cars and spoke to the "service department". This employer was a 40-minute drive from Mitkovski's home and about 25 miles each way.

Mitkovski testified that from the tone of the voice of one of the persons to whom he spoke, he believed himself to be unwelcome (Tr. 392). He testified that the

prospective employer turned him away and never asked his name. Mitkovski testified that his was strange since he told the prospective employer that he worked for Overseas Motors which was widely known to have the best mechanics in the State of Michigan. Lastly, Mitkovski testified that he telephoned Overseas Imported of Ann Arbor in January or February 1981 but, on redirect, appeared to testify that he telephoned them numerous times into the middle of 1982.

The sales manager (who also was responsible for the operation of the Service Department) for Overseas Imported Cars of Ann Arbor, Dennis Williams, testified that the Fiat franchise at that establishment ceased in 1982 because Fiat ceased selling new cars in the United States. In 1980, over 50 percent of its business was servicing Fiat cars; in 1981 it was somewhat less than 50 percent and by 1982 it had dropped to 40 to 45 percent. In the period 1980-1984, Overseas Imported of Ann Arbor hired a total of four persons to service cars: one of them, hired apparently in 1981 (Tr. 477) was a mechanic; the others were trainees doing prep work, oil changes and tune ups. (Tr. 476) *et. seq.*).

After Respondent elicited from Mitkovski the admission that he never filed a written application at any of the five Fiat/Lancia dealerships at which he sought employment, Mitkovski requested an opportunity to explain why he had not submitted such applications (Tr. 168). Respondent objected (Tr. 169) but then stated that since the Judge had asked the question why no applications had been submitted, he was not going to object to the answer (Tr. 169). When the undersigned then stated that he did not want Respondent to fail to object merely because the judge was asking the question (Tr. 169), Respondent decided to object and that objection to an

explanation of why Mitkovski submitted no applications was sustained (Tr. 170).

2. Art Moran Fiat/Lancia:

Mitkovski testified that he had first asked for employment as a mechanic at Art Moran Fiat/Lancia on the Monday following his 21 October unlawful discharge. He did not fill out an application but sought employment from the sales manager (whom he knew) at the adjoining Pontiac dealership (the parent of the Fiat installation, about 20 yards away, and apparently commonly owned and operated). When he spoke to this Sales Manager, "Mr. Rosario," he did not speak to the Service Manager (a heavy set man) who was standing within 3 feet of Rosario (Tr. 184-185). This conversation arose in the following manner.

On occasions prior to this October, 1980 visit, Mitkovski had visited the Art Moran Fiat establishment on business from Overseas Motors and had spoken to Rosario who was then employed as sales manager in the Fiat dealership. On these occasions, the last of which was about three (3) days before the unlawful October, 1980 discharge from Overseas, Rosario asked Mitkovski to quit Overseas Motors and come to work at Art Moran. He offered higher wages to Mitkovski if he came to work at Art Moran. At the time of the last of these pre-discharge conversations, an Art Moran mechanic had quit in order to work for Overseas Motors and Rosario needed a mechanic. Mitkovski told him that the Art Moran establishment was too far away and that he was happy working for Overseas Motors. But when Mitkovski returned after the 21 October discharge, and asked Rosario for the job as a mechanic, Rosario said: "Not now. I do not have any openings right now." Mitkovski

testified that, only 3 days before, Rosario had been "begging him" to come to work for Art Moran.

In view of this testimony, particularly Rosario's failure to notify Mitkovski that the job opening had been filled or of some other disqualifying explanation, and based upon record testimony that Class "A" Fiat mechanics, like Mitkovski, were, at least in the fall of 1980, a scarce commodity, I conclude that Rosario's statement to Mitkovski, an unexplained and apparently unjustified action, indicated a *prima facie* "blackball." Mitkovski's recitation of the tone in which Rosario told him that there were no "openings right now", only 3 days after Rosario had "begged" Mitkovski to come to work for Art Moran, constitutes further *prima facie* evidence of a "blackball." I do not suggest, much less find, that the "blackball" was caused by Overseas Motors. The Detroit Fiat dealerships in this period, apparently had an interchange of employees, including to and from Overseas Motors. Thus, any circulation of knowledge of Mitkovski's firing (and the reason therefore), on this record, cannot be seen as Respondent's responsibility. The short period of time (three days) it took to circulate the news, causing Rosario's apparently abrupt reversal, is taken into account. Whether this "blackball" was induced by Overseas Motors or not, however, Mitkovski's engaging in activities protected by the National Labor Relations Act, on this record, had made him unwelcome as an employee at Art Moran. And, on this record, there was a job for him there at that time.

In any event, Mitkovski returned to the Art Moran establishment a few weeks later and this time spoke to the Service Manager ("a little heavy guy"). He asked him if there were any job openings and the Service Manager told him that there were none (Tr. 185).

In a third visit, in 1981, a month or two later (Tr. 186), Mitkovski spoke to the Service Manager again and again left no application, address or phone number. Rosario knew his phone number or certainly how to contact him.

In a fourth visit to Art Moran in the summer or fall of 1981 (thus a year after discharge) he spoke to Sales Manager Rosario again. By this time, however, Mitkovski was not looking for a job as a mechanic but was seeking to sell a product called "Stop-A-Flat", a sealant for tire inner-tubes. Mitkovski was then working for and representing "Woodruff and Associates" in selling this device to automobile dealers.

1981 Interim Employment:

This fourth visit to Art Moran followed shortly after Mitkovski had sought, and obtained, part-time interim employment at Lincoln Park Foreign cars, a Fiat dealership in the Detroit area. He worked at Lincoln Park in April and May, 1981 for about 4 to 6 weeks (Tr. 247). This dealership is about 15 to 18 miles from his home; a 20-minute drive. Although Mitkovski had asked Mel Barna, owner of Lincoln Park Foreign Cars, for a full-time job, the only job available was part-time work. Mel Barna promised him a full-time job if one ever opened up but warned Mitkovski that 1981 was a recession year and he could not guarantee him such a job. At the end of May, Barna laid off Mitkovski and told him that there might be a job in the fall of 1981. No such job materialized notwithstanding that Mitkovski returned to speak to Mel Barna before Christmas 1981. At that time, Lincoln Park Foreign Cars had lost one of its four mechanics but Barna told Mitkovski that there was not enough work to justify replacing the laid off mechanic; that everyone was slow and that he was not hiring anyone (Tr. 255). In the spring and summer of 1982,

Mitkovski telephoned Lincoln Park Foreign Cars, but Barna turned down Mitkovski's request for a job.

After having been laid off from Lincoln Park Foreign Cars, Mitkovski made the above fourth visit to Art Moran as a salesman for Woodruff and Associates.

Later in 1981, or early 1982, Mitkovski returned for a fifth visit to Art Moran seeking a job. There was no employment for him at that time. After this fifth visit, Mitkovski made phone calls into 1982. After 1982, he did not again apply for a job at Art Moran because Art Moran had discontinued its Fiat sales and had become a Renault and Jeep sales dealership. Mitkovski testified that he did not know if Art Moran continued to service Fiat cars but, when he drove by, he saw that the Fiat signs had been removed and replaced with Jeep signs (Tr. 196).

Mark Coughnanour, sales manager of Art Moran Fiat in the period 1980-1983, knew Mitkovski and recognized him as the person who sought to sell the "Stop-A-Flat" flat tire repair kit. He could not remember when this occurred. He testified that there was little interchange of mechanics between the Pontiac establishment (25-30 mechanics) owned by Art Moran (Tr. 510) and the six to eight "A mechanics" working in the adjacent Fiat establishment. There was no interchange of Pontiac and Fiat mechanics, he said, because of the differences in the special tools and special training (Tr. 511) Although he testified (Tr. 507, 523) that Art Moran had newly hired six to eight "A mechanics" in the period 1980-1983, his testimony was ultimately unclear as to whether these "A mechanics" were hired *locally* in the period of 1980-1983. Indeed, at one point his testimony was that Art Moran hired *no* "A mechanics" for Fiat/Lancia in the period 1980-1983 (Tr. 514). He did testify, however, that specially trained mechanics such as Fiat mechanics, and other mechanics trained on foreign cars, feel more com-

fortable working on foreign cars; and of course, since wages are paid on a piece rate basis, mechanics trained on particular foreign cars make more money working on the foreign cars than on domestic cars.

Coughanour testified that the usual method for hiring mechanics was through the filing of applications and that such applicants, if there was work available, would be interviewed by either himself or the service manager (Tr. 504). He admitted, however, that Mitkovski could have applied for a job as a mechanic at Art Moran Fiat and that he would not have known about it.

With regard to the pay rate of trainees or "B" mechanics, he testified that they were paid around $5.50, to $6 per hour (Tr. 426).[5]

Concerning the use of foreign car mechanics on American cars, Coughnour's testimony appears to be inconsistent with that of Dennis Williams, the Sales Manager at Overseas Imported Cars of Ann Arbor *supra*. Dennis Williams' testimony that a mechanic who is well trained could work on any car and that there was literally no objection to or impediment in Fiat mechanics working on other cars.

3. Joe Dwyer, Inc. Fiat Co.:

Mitkovski testified that Joe Dwyer Fiat is about a half-hour drive or 20 to 22 miles from his house and that he visited that establishment four or five times for employment commencing with the Monday after his 21 October unlawful discharge. As in his other attempts to find employment, he never filed an application. Rather, he relied on speaking to mechanics in the shop as he had

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[5] **At the time of his unlawful 1980 termination, Mitkovski and the master mechanic were paid $11.20 per hour, Respondent's highest rate.**

done when his friend and countryman, Rudy Vuzicevic, brought him to Overseas Motors for a job and he successfully found employment there (Tr. 413-414). His experience was that, as a mechanic, he could get a job by talking to other mechanics (Tr. 413).

Mitkovski testified that four mechanics had quit Overseas Motors to work for Joe Dwyer Fiat (Tr. 202). When he went there on the first occasion (Tr. 201), he spoke to "Jim" a tall fellow. When he asked "Jim" for a job, Jim told him that he didn't want to talk to him and said: "I have nothing open, leave me alone." (Tr. 202-203). As in the case of his similar, post-discharge reception from Sales Manager Rosario at Art Moran Fiat, I conclude that this credited and uncontradicted testimony lead to the inference that Mitkovski was being blackballed, as well, at Joe Dwyer Fiat. There is no other record explanation for the hiring person, without more, to tell Mitkovski to "leave me alone."[6]

In November of 1980, about a month later, he visited Joe Dwyer Fiat for the second time and spoke to "Jim" again after asking the "write-up man" at the write-up desk for the Service Manager or Foreman. At this point, Mitkovski had already learned that "Jim" was the service manager and had learned from his friends, the four former Overseas Motors mechanics who were then working for Joe Dwyer Fiat. On this second visit (Tr. 205) Jim told him that there was nothing for him at that time.

In a third visit, before Christmas 1980, Mitkovski spoke to a "girl" at the write-up desk, asked for the service manager, was told that he was not in and then asked if there were any jobs. He was told that there

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6 **At *Overseas Imported Cars of Ann Arbor, Inc., supra* Mitkovski's December 1980 job request was met with: "Oh, you — no job. Ask me next month (Tr. 164-165). This reception was somewhat less abrasive than Joe Dwyer Fiat request ". . . leave me alone."**

were no jobs and Mitkovski said he did not know the name of the girl to whom he spoke.

In a fourth visit in January or February 1981, he asked one of the mechanics who had formerly worked for Overseas Motors if there was any work and was told that there was not. (Tr. 209)

In a fifth visit, later in 1981 but before August 1981, he was told that there was no work. Thereafter, in 1981, he telephoned the Service Department, asked for work as a mechanic and was told that there was no opening. He testified that he telephoned on many occasions until the fall of 1982 (Tr. 415).

Joy Maison, office manager of Joe Dwyer testified that Mitkovski never filed an application for a job and that Joe Dwyer had run advertisements for mechanics two or three times in the period 1980-1984. It was unclear whether these advertisements were placed in 1980 before the backpay period or in 1984 after the backpay period. She testified that if Joe Dwyer was not hiring when an application was tendered, it would be discarded (Tr. 558). Similarly, when she testified (Tr. 569) that Joe Dwyer hired four or five mechanics in the period 1980-1984, she does not know when the mechanics were actually hired. Thus they could have been hired before Mitkovski was discharged in 1980 or after he was reinstated in 1984.

Robert D. Leggieri, Joe Dwyer's Service Manager in the period October 1980 through November, 1981, testified that the preferred and usual method for hiring mechanics was through the filing of applications; that he knew Mitkovski and Mitkovski had never filed an application and to his knowledge had never sought employment at Joe Dwyer. He testified that in the period of his employment as service manager, Joe Dwyer hired two "A" mechanics but both were hired

before October 1980 and *none* were hired between October 1980 through November 1981 when he left Joe Dwyer (Tr. 593-594).

Leggieri also testified that he is presently a customer of Overseas buying Fiat parts from it; was removed as a customer entitled to credit and placed on a cash basis by Overseas Motors; is still indebted to Overseas Motors; was told, apparently in about 1986, that Overseas Motors had labor trouble which was a "terrible situation" and that it had closed down its service department because of labor trouble. He testified that he did not hear of this labor trouble as early as 1980 or 1981 (Tr. 624). Since Leggieri is a customer and debtor of Overseas Motors, was cut off from credit, placed on a cash basis and still owes money to Overseas Motors (Tr. 620 *et. seq.*); and since his testimony was that Mitkovski did not seek employment at Joe Dwyer to his knowledge, there is no necessary inconsistency between Mitkovski's testimony that he sought employment there and Leggieri's testimony that he did not know about it. Were a credibility choice required, I would not credit Leggieri's testimony concerning Mitkovski's attempt to seek employment at Joe Dwyer. Leggieri, however, confirmed that his assistant, as manager of the Service Department, was "Jim" Dwyer in the period 1980-1981. Thus where Mitkovski testified that he spoke to "Jim" on at least two occasions, on the basis of this record, it appears in the absence of contrary evidence, that "Jim" was Jim Dwyer, the assistant service manager to Leggieri. Furthermore, since I have credited Mitkovski's undenied testimony that "Jim" asked Mitkovski, after Mitkovski requested a job, to "leave me alone," I conclude that if Jim Dwyer[7] was blackballing Mitkovski, this fact was not unknown to Leggieri.

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[7] **Jim Dwyer is a member of the family owning Joe Dwyer Fiat.**

Furthermore, Leggieri confirmed that the other person working at a desk in the service department was Barbara Ramyl. She was a service adviser in the department and a warranty claims clerk in 1980 and 1981 (Tr. 587-588). Jim Dwyer, as the service assistant, was Mr. *[sic]* Ramyl's superior in the chain of command (Tr. 588). Mitkovski's testimony on these points is thus supported by Ramyl's presence as the "girl" at the write-up desk in the Service Department.

4. Auto Village Fiat:

Auto Village, a 40-minute drive and 25 miles from Mitkovski's house, was a Fiat and Volvo dealer. In late 1982, however, it dropped the Fiat line (Tr. 215).

Mitkovski first visited Auto Village for employment on the Tuesday following his 21 October discharge. He sought employment from his fellow Yugoslavian, "Miroslov," a mechanic for 30 years at Auto Village and also its shop foreman (Tr. 218-110) *[sic]*. He did not leave an application.

He made a second visit 3 to 4 weeks later and spoke to someone at the service department write-up desk, not "Miroslov." He asked for a job, was refused, and left. He left no name, address or phone number.

On a third visit in late 1980 he again spoke to "Miroslov" but there was no job.

He made fourth and fifth visits in the winter and spring, 1981, and found no work there. He did not file an application or leave his phone number. When Respondent asked *why* he did not leave a phone number and, as in the case of *why* he did not leave an application, Respondent withdrew the question and successfully moved to strike the question before the answer could be given (Tr. 225).

5. Eastland Motors Co.:

Mitkovski testified that in the first week after his October 1980 discharge, he visited Eastland Motors, spoke to someone in the service department and asked for a job. He was there no more than 2 to 3 minutes and was told there was no work available. He never returned to Eastland Motors but did make one subsequent phone call. Mitkovski testified that he was not particularly interested in Eastland Motor because it was too far away, approximately 1½ hours in the rush hour.

Mark S. Zabawa, Service Manager of Eastland Motors in the period of 1977-1982, with the power to hire and fire mechanics, testified that he had no recollection that Mitkovski had ever applied for employment and testified that he could not recall if any of the six mechanics that he had hired were hired in the period October 1980 through June of 1982 when he left Eastland Motors (Tr. 234). He testified that it was possible that an applicant for employment could have entered the shop and asked for employment without contacting Zabawa. It was also possible that Mitkovski had telephoned, asked Zabawa for work and that Zabawa could not remember him (Tr. 238).

Other Fiat Dealerships:

Respondent elicited testimony that there was a Fiat dealer known as Imported Cars of Royal Oak, Michigan, about 25 miles distance from Mitkovski's home and about 1 hour's drive in the rush hour. Mitkovski testified that he never applied there for employment. With regard to M&W Motors, in Mt. Clemens, Michigan, Mitkovski never applied there because it was 50 miles away and a 2 to 2½ hour drive. Mitkovski testified that he was not certain that he knew that it was a Fiat dealer. Finally, with regard to Eastern Sports Car Co. in Fraser, Michigan Mitkovski testified that he did not know of its existence

and never made an application there (Tr. 326-327). In fact, however, it is not clear on this record whether Eastern Sports Car was a Fiat dealer.

Thus according to Mitkovski's credited testimony, he sought employment at five Fiat dealers in the Detroit, Michigan area but failed to seek employment at a sixth (Imported Cars of Royal Oak, Michigan).

Mitkovski worked for Overseas Motors for about 4½ years in the period 1976-1980, and was a top rated and paid mechanic. The record shows the above efforts to seek interim employment, after his unlawful discharge, at least in the period 1980-1982. Since the backpay period also includes the years 1983 and 1984, and since Respondent asked no questions regarding this period, I sought to question Mitkovski with regard to the years 1983-1984. The General Counsel, however, objected noting that the burden of proof to show a failure to seek interim employment in this period was on the Respondent and that my questions in this regard were prejudicial (Tr. 439). I sustained the General Counsel's objection to my questions. Respondent did not adduce evidence for this period.

In response to General Counsel's question, Mitkovski testified that he looked for interim employment during the entire period: from his unlawful discharge in October 1980 through the Respondent's offer of reinstatement in September 1984 (Tr. 446). In view of the General Counsel's question, I then asked Mitkovski where he had looked for work in the long periods when he was without interim employment and while he was engaged in self employment (Tr. 447-448) While the record showed that he had made efforts at the Fiat dealerships, working as a mechanic for Lincoln Park Foreign Cars, as a salesman for Woodruff and Associates and its "Stop-A-Flat" repair kit, and for Overseas

Imported Liquors as a liquor salesman, I asked him if there was any place else that he had sought employment (Tr. 448). Respondent objected to this question (Tr. 448) and I sustained the objection, admonishing Respondent that Respondent would have the obligation to asked that question, if it desired to (Tr. 448).

Lastly, Respondent called William H. Jennings, Jr., Service Manager at Joe Dwyer Imports in the period September 1981 through June 1983 and Service Manager at Auto Village in the period May 1984 through August 1986. Jennings testified that in the interim period, June 1983 through May 1984, he left Joe Dwyer Imports and returned to Overseas Motors as its assistant service manager.

Jennings testified that he had known Mitkovski since 1976 when both of them worked together as mechanics at Overseas Motors for a period of about 6 to 8 months in 1977. He testified that Mitkovski never filed a written application or asked about a job opening at Joe Dwyer Imports. He further testified that in or about March 1982 he hired a class "A" mechanic (Gonterman) who had filed an application a week before, and had paid the mechanic $10 per hour. He also testified that in or about the period 1981 through 1983, he also hired two trainees and paid them at the rate of between $4.50 and $6.50 an hour.

With regard to his service at Auto Village as its service manager, he testified that Auto Village was so desperate for mechanics that he offered to pay a $100 bounty to any of his mechanics who could bring in a mechanic who was hired. He testified, however, that he was not interested in Fiat mechanics but only in Volvo mechanics (Tr. 665).

With regard to the period as far back as 1982, he testified he was familiar with the records of Auto Village

and knows that Mitkovski never filed an application nor did anyone tell him that Mitkovski was seeking employment. Auto Village dropped the Fiat line in 1982. He further testified that Auto Village hired seven mechanics in the period 1982-1984; three trainees, two master mechanics and two non-master mechanics. Jennings not only identified Barbara Ramyl as his assistant Service Manager at Joe Dwyer Imports (in the period 1981-1983), i.e., as Mitkovski testified, the girl at the write-up desk, but also admitted that it was possible that a mechanic looking for a job could come to Joe Dwyer and be told that there was not work available without anyone notifying him (Tr. 657).

DISCUSSION AND CONCLUSIONS

1. In the discussion and conclusions above, with regard to interim earnings and the basis on which Mitkovski and his family survived during the backpay period (where he had interim earnings of only $14,000 and unemployment compensation of only $4,000), I have found that the $60,000 in loans formed the additional and substantial basis of his ability to meet his debts of about $90,000 to $96,000. Furthermore, the apparent discrepancy between the $78,000 or $80,000 of Mitkovski's funds and the $96,000 in debts posed by the Court, in my estimation, and notwithstanding the findings of the court, is in error. That $96,000 fails to take into account the period of 26 weeks, i.e. 6 months, when Mitkovski's expenses were not $2,000 a month, but something less than that since his expenses were paid for by family in Yugoslavia while Mitkovski was out of the country. While I do not agree with General Counsel that the entire monthly expense of $2,000 for this 6-month period should be subtracted i.e., $12,000, it stands to reason that, while his mortgage and other fixed utility payments in the United States required payment, his other expenses

in this 6 months were paid for by family in Yugoslavia. Whether or not this is taken into account, however, I find that his interim earnings and unemployment compensation together with the size of the $60,000 in loans, alone, dispose the argument that Mitkovski has been proven to have failed to disclose interim earnings much less that any failure so disclosed was intentional.[8] It is only where the claimant "willfully deceives" is there a basis for disqualification of backpay, and faulty record keeping is not enough. *American Navigation Co.*, 268 NLRB 426, 428 (1983); *Hickory's Best, Inc.*, 267 NLRB 1274, 1276; cf. *NLRB* v. *Flite Chief, Inc.*, 640 F.2d 989, 992-993; *Rainbow Tours, Inc.* v. *NLRB*, Memorandum Opinion (unreported), filed December 4, 1987, C.A. 9, enf'g. 280 NLRB No. 17 (1986); 124 LRRM 1099. Here, there is proof of no deception, willful or inadvertent.

2. With regard to the issue whether Mitkovski made a good faith effort to find interim employment, the burden is on Respondent to prove that Mitkovski did not make a good faith effort to find interim employment in the backpay period. Mitkovski has no affirmative burden of proof.

The legal framework in which to place may of the facts in this case regarding Mitkovski's effort to find interim employment has been recently restated by the United States Court of Appeals for the 6th Circuit in *NLRM* v. *Westin Hotel*, 758 F.2d 1126 (C.A. 6, 1985); 118 LRRM 3297.

In *NLRM* v. *Westin Hotel, supra*, 118 LRRM at 3299, the Court stated:

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[8] **Mitkovski was not a record keeper. He testified, for instance, at length concerning the dishonor attendant on the granting and acceptance of promissory notes memorializing loans. Honor was satisfied, according to Yugoslavian custom, as I understood him, if the borrower drafted and signed the note.**

> In addition, it is beyond preadventure that the defense of wilful loss of earnings is an affirmative defense with the burden of proof resting upon the employer [case citations omitted].
>
> Further, a wrongfully-discharged employee is only required to make a reasonable effort to mitigate damages, and is not held to the highest standard of diligence. This burden is not onerous, and does not mandate that the plaintiff be successful in mitigating the damage [case citations omitted]. The reasonableness of the effort to find substantial equivalent employment should be evaluated in light of the individual's background and experience and the relevant job market. [case citations omitted].
>
> * * *
>
> The general rule in labor cases is that "an employee must at least make reasonable efforts to find new employment which is substantially equivalent to the position [lost] . . . and is suitable to a person of his background and experience." [citations omitted] In addition, the burden of proving lack of diligence by the wrongfully discharged employee is on the employer. Finally, the decision of the Board regarding "diligence" is a factual one properly reviewed on the standard of substantial evidence."

Where the discharged employee has little or no training for a particular job, he is not required to seek employment in a strange capacity. This is true with regard to Mitkovski's failure to seek employment servicing American cars.[9] *Terpening Trucking Co., Inc.*, 283

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[9] **Mitkovski did seek employment servicing Japanese cars and was refused.**

NLRB No. 61 (1987). The testimony of Respondent's witnesses Coughnanour (Art Moran Fiat) and Dennis Williams (Overseas Imported Cars) is inconsistent on the issue whether foreign car mechanics would be hired to work on American cars. The failure of a discriminatee to register with a state agency is not determinative of the question of whether a diligent search for interim employment was made, *Wayne Trophy Corp.*, 254 NLRB 881, 882; and although a discriminatee is required to make a reasonable search for work in order to mitigate loss of income and the amount of gross backpay, the Board and the Courts, as above noted, have held that the claimant is "held . . . only to reasonable exertions in this regard not the highest standards of diligence . . . the principal of mitigation of damages does not require success it only requires an honest good faith effort . . ." *NLRB* v. *Arduini Manufacturing Co.*, 394 F.2d 420, 422-423 (C.A. 1, 1968); *NLRB* v. *Madison Courier, Inc.*, 472 F.2d 1307 (C.A. D.C., 1972). However, in applying the above standards of obligation on the discharged employee, all doubts should be resolved in favor of the claimant rather than in favor of the Respondent wrongdoer. *Duroyd Manufacturing, Inc.*, 285 NLRB No. 1 (1987). In addition, the rule is, pursuant to *NLRB* v. *Madison Courier, Inc.*, 472 F.2d 1307 C.A. D.C. (1972); *United Aircraft Corporation*, 204 NLRB 1068 (1973), that any doubt as to when a claimant is justified in "lowering his sights" should be resolved in favor of the innocent discriminatee. The Board rule is that the backpay claimant should receive the benefit of any doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved. *United Aircraft Corporation, supra*, at 1068 (citations omitted).

Here, the testimony fails to show that Mitkovski rejected any job whatsoever. On the contrary, the one

interim mechanic job that he held, albeit a part-time job at Lincoln Park Imported Cars, showed that he repeatedly requested permanent employment on a full-time basis from its owner, Mel Barna and was, over a period of more than 6 months after involuntary layoff, refused permanent employment on the ground that there was no available work. In addition the undisputed evidence showed that in 1981 and 1982, Mitkovski sought to mitigate the failure of any employer to employ him as a mechanic by selling a flat tire remedy (Stop-A-Flat with Woodruff Associates) and then trying to get into the liquor importing business (with Overseas Imported Liquors). The fact that neither of these attempted careers outside the field of his specialization was successful cannot be held against Mitkovski under the existing rule that a lack of success in finding work does not establish that the search itself was insufficient. Whether these different careers are lowering or changing his "sights" is arguable. The fact is that Mitkovski was seeking work. *NLRB* v. *Madison Courier, Inc., supra, NLRB* v. *Miami Coca Cola Bottling Co.*, 360 F.2d 567 (C.A. 5, 1966); *Triangle Sheet Metal Works*, 267 NLRB 650 (1983).

In the instant case, what Respondent ultimately argues is a question of credibility. The ultimate argument, as I understand it, is that since Mitkovski left no applications or phone numbers, and relied upon friends and fellow mechanics in his visits to various shops at various times (and telephone calls), these efforts should not be credited. While I am mindful that he did not leave an application or phone number at any of the establishments that he visited, and perhaps he should have, it should be kept in mind that he did not file an application with Overseas Motors in gaining his job but gained the job through intercession of his colleague, the mechanic Rudy Vuzicevic. He follows a similar "system" in seeking employ-

ment after his unlawful discharge. More important, however, the Court of Appeals for the Sixth Circuit, in *NLRB* v. *Westin Hotel,* 118 LRRM 3297, 3300, has specifically rejected placing *any* burden on the discriminatee to prove a ". . . systematic method of searching for a job" (quotation marks in the original text).

While I might still ordinarily be impressed, as a *prima facie* matter, with Respondent's argument that the failure to leave telephone numbers, applications or addresses, should lead to the inference that such efforts either were not made, or were not serious efforts to seek employment, there are three factors which lead to my crediting Mitkovski in his testimony that he made a diligent search for interim employment.

(a) In the first place, I have found that, there was *prima facie* evidence of record herein of a blackball by two or three of the Fiat employers regarding Mitkovski employment. Thus "Mr. Rosario" at Art Moran Fiat said that there was no work for him "right now" even though 3 days before and on other occasions before that, he had been "begging" Mitkovski to leave Overseas Motors with a promise of higher pay and to come to work at Art Moran. Secondly, "Jim" Dwyer at Joe Dwyer Imports, told him that there were no work available and that Mitkovski should ". . . leave me alone." Thirdly, at Overseas Imported Cars of Ann Arbor, he was met with "Oh, you — no job." Under these circumstances, one does not have to draw a diagram to infer that Mitkovski would get the message that he was not wanted at these places. Such receptions might lead a reasonable person to feel discouraged in seeking employment. Mitkovski, however, returned to these employers again and again.

(b) I am also mindful of the fact that Mitkovski identified Sales Manager Rosario (at Art Moran Fiat) Jim Dwyer (at Joe Dwyer Import) and Shop Foreman

"Miroslov" (Auto Village Fiat) as persons to whom he spoke, requesting employment, in addition to the "girl at the desk" at Joe Dwyer. These were not unknown mechanics or employees to whom Mitkovski spoke when he entered the service departments seeking employment. These were Sales or Service Managers and Assistant Managers with the power to hire. They could be called as witnesses to not only disprove Mitkovski's alleged attempts to gain employment at these dealerships but to seriously undermine his credibility that any efforts were made at all. Respondent failed to call "Miroslov", Jim Dwyer, Rosario (or Barbara Ramyl to whom Mitkovski spoke on his third visit to Joe Dwyer Imports) or any other witnesses to disprove these efforts. In none of these cases did Respondent seek to confront Mitkovski with these persons in order to show that he had never actually applied for work. What Respondent showed was that Mitkovski did not speak to personnel that he, were he using a systematic approach, should have spoken to. Perhaps he should have. But the burden of a "systematic approach", in the 6th Circuit and the Board, is not placed on the claimant. Compare: *NLRB* v. *Western Hotel, supra,* with *Rainbow Tours, Inc.*, 280 NLRB No. 17 (1986); 124 LRRM 1099. Here was not the "straw man" failure to file written applications but ripe opportunities to put the lie to Mitkovski. Instead, Respondent failed to call as witnesses any of these named representatives of employers from whom Mitkovski claimed to have directly sought employment. Such a Respondent failure strongly supports Mitkovski's credibility. See *Wayne Trophy Corp.*, 254 NLRB 881 (1981). Moreover, Respondent's failure to call and examine Rosario and Jim Dwyer avoids placing on the witness stand hiring agents who, according to Mitkovski, blackballed him. Again, it was Respondent's rather than General Counsel's burden to rebut

Mitkovski's testimony on this point. Respondent failed to support its burden of proof that Mitkovski did not seek out the job opportunities he testified about. *Rainbow Tours, Inc.*, 290 NLRB No. 17 (1986).

(c) Furthermore, as the record shows, when Mitkovski attempted to explain to Respondent why he failed to file applications, why he did not leave phone numbers, and where he sought work in the period 1983-1984 (the final 2 years of the backpay period), Respondent in the case of the failure to file applications and leave telephone numbers and names or addresses, successfully objected to such explanations. (Tr. 170; 225). And, following Mitkovski's bland testimony that during the entire backpay period of 1980-1984 he continued to look for work (Tr. 446), when I attempted to press Mitkovski into stating exactly where he looked for work (aside from attempts at the Fiat dealers, the Japanese car dealers, as a salesman for Stop-A-Flat and in the liquor business), Respondent objected to that attempt to gain an explanation. Respondent thereafter failed to explore the period 1983-1984 at all. This is not indicative of Respondent supporting its affirmative obligation to disprove Mitkovski's testimony that he made reasonable efforts to seek interim employment. Respondent, as I observe the record, appeared to be under the misapprehension that Mitkovski had some burden of proof with regard to his search for work. On the contrary, that affirmative burden rests with Respondent to show lack of a good faith effort rather than on Mitkovski to show a good faith effort.

What the record shows with regard to the five Fiat establishments (out of the six that Mitkovski knew about), all within the Metropolitan Detroit area, is that Mitkovski made more than 20 visits in the 18 months to 2-year period following his discharge and numerous

phone calls. In that same period (1981) he sought and worked at interim employment at Lincoln Park Foreign Cars, and thereafter, failing to find work as an automobile mechanic (due to the blackball or otherwise) he sought work as a salesman for Stop-A-Flat and as a liquor salesman. For the period 1980-1982, I conclude that Respondent failed to prove that Mitkovski did not make a good faith effort to seek interim employment by these efforts. As above noted, Respondent failed to call witnesses to impeach Mitkovski's credibility where the persons were actually named by Mitkovski; and it failed to seek or itself prevented explanations by Mitkovski where he looked for work in 1983-1984 and of his failure to follow what might be called routine methods of seeking employment, i.e. leaving written applications, or his name and address. Certainly with regard to the final 2 years of the backpay period, the record is wholly incomplete. Respondent has failed to sustain his burden to show that in those last 2 years, 1983-1984, Mitkovski did not make a good faith effort to seek interim employment.

I therefore conclude that the evidence adduced in this record fails to show that Mitkovski was guilty of willfully hiding interim earnings; that he failed to make a good faith effort during the backpay period to seek interim employment; and that any discrepancy between his admitted interim earnings ($14,000) and his expenses ($90,000) when modified by his unemployment compensation ($4,000) and the loans ($60,000) he received, fails to demonstrate that he was hiding interim earnings.

Respondent argues that Mitkovski should have "lowered his sights" and sought work in some capacity other than as a "class A" mechanic. His failure to do so is urged as a disqualification from an award of backpay. Respondent urges that he should have looked for a job

as a trainee mechanic or even something unrelated to being a mechanic (Respondent's brief, page 10).

Although some of the courts[10] have alluded to a requirement of the discriminatee "lowering sights", the Board has never applied this doctrine as an absolute obligation. Whatever the applicability of this Doctrine to other circumstances, the doctrine cannot be applied to the instant facts. Here, there was a blackball against Mitkovski. Since Rosario, on this record, apparently had a job actually available for Mitkovski as a Fiat mechanic and Mitkovski was blackballed, Mitkovski should be under no obligation to "lower his sights". Rather, it was Respondent's misconduct, directly or indirectly, which led to the failure to get the job from Art Moran Fiat. This was only a few days after the discharge in 1980, before the 1981 recession.

Furthermore, Mitkovski did "lower his sights" by becoming a salesman for Stop-A-Flat (1981) and then attempting to go into the liquor business as a salesman (1982). It is unclear whether these Mitkovski actions constitute a raising or lowering of his sights but they certainly demonstrate that he was trying to overcome the difficulty gaining employment as a mechanic.

I also find it remarkable that the doctrine would apply to Mitkovski, a clearly superior "class A" Fiat mechanic, when Respondent had it within its power at any time during the backpay period to cut off the run-

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10 The "lowering of sights" doctrine is analyzed in *NLRB* v. *Madison Courier, Inc.*, 472 F.2d 1307 (C.A. D.C. 1972); 80 LRRM 3377, 3385. The Sixth Circuit applies the lowering of sights doctrine where the other employment is "suitable" and where the rate of pay is "somewhat lower." *NLRB* v. *Southern Silk Mills, Inc.*, 242 F.2d 697; *cert. den.*, 355 U.S. 821 (1957) as cited in *NLRB* v. *Madison Courier, Inc.*, 80 LRRM at 3385.

ning of backpay, *United Aircraft Corp.*, 204 NLRB 1068 (1973). And assuming that the "lowering of sights" doctrine is applied to Mitkovski, what job should he consider? Should it be, as Respondent urges, as a trainee mechanic at $5 or $6 per hour? Would this support his family?[11] And if so, for how long should he work at this job? And if he should work at this job, when should he look for employment as a class A mechanic? At nights, on weekends? On holidays?

Respondent further, argues, under the doctrine of *NLRB* v. *Mercy Peninsula Ambulance Service, Inc.*, 589 F.2d 1014 (C.A. 9, 1979), that, even admitting Mitkovski's efforts at interim employment, they are insufficient with regard to this 4-year backpay period.

Not only did Respondent successfully object to Mitkovski's attempt to make an explanation of where and how he looked for work in the final 2 years of the

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[11] The sixth Circuit's opinion in *NLRB* v. *Southern Silk Mills*, 242 F.2d at 700, predicates application of the "lowering sights" doctrine, in part, on the discriminatee's obligation to support himself and his family. At the time of unlawful discharge, Mitkovski was earning $11.20 per hour. Are the trainee jobs which Respondent's brief alludes to "available, suitable employment"? Are such jobs paying $5 to $6 per hour capable of supporting Mitkovski's family and thus "suitable" at a "somewhat lower rate of pay"? Both are *Southern Silk Mills* requirements for application of the doctrine. If family expenses are near $2,000/month, a pay rate of $6/hour would leave Mitkovski working at an annual deficit of about $11,000 per year ($24,000-$13,000).

Moreover, *NLRB* v. *Madison Courier*, 80 LRRM at 3385 discloses the legal perils of the "lowering sights doctrine." Should the sights be lowered soon after discrimination or be postponed? By too quick action in accepting a low paying job, the discriminatee is in danger of incurring a proscribed "willful loss," *Rainbow Tours, Inc.*, 280 NLRB No. 7; if he waits to long, he fails to mitigate. And what if Mitkovski moved away from Detroit and sought work elsewhere. If the relocation is ultimately shown to have been to an area where job prospects were inferior to Detroit's, was this a willful loss of earnings sufficient to cause loss of backpay? See: *Duroyd Manufacturing Co.*, 285 NLRB No. 1 (1987).

backpay period (Tr. 446-448), but Respondent's reliance on *Mercy Peninsula Hospital* is without merit. In essence, *Mercy Peninsula* held that three attempts per month looking for work demonstrated a lack of reasonable diligence. In the instant case, Respondent contends, as was the apparent contention in *Mercy Peninsula,* that Mitkovski's searches for interim employment were unreasonable as a matter of law. The 9th Circuit has recently reviewed *Mercy Peninsula* in *Rainbow Tours, Inc.* (officially unreported, December 4, 1987), enforcing NLRB No. 17 (1986) and has held that *Mercy Peninsula* does not adopt a fixed standard that is applied mechanically to determine if a job search was reasonably diligent (Sl. op., *Rainbow Tours, Inc.,* at page 9-10).

Moreover, in *Mercy Peninsula Ambulance Service Inc., supra,* the Court's holding was based, at least in large part, on *NLRB* v. *Arduini Manufacturing Corp.* 394 F.2d at page 424, where, the court in *Mercy Peninsula* noted that, the discriminatee was not reasonably diligent where he did not apply to an employer that he *knew* was hiring in his field of work. Here, however, Mitkovski knew that Art Moran (Rosario) was hiring and, indeed, wanted to hire *him.* he applied for employment to Rosario and was refused. Thus, *Mercy Peninsula* is inapposite.

Finally, Respondent makes two associated arguments with regard to the $60,000 in loans. (a) Respondent argues that the evidence shows that the loans were *forgiven* by the lenders and therefore should be thought of as income rather than loans. Respondent urges that the loans have been forgiven because they are long past due; because the statute of limitations has run on them; and because lender Josifovski testified that he had not asked Mitkovski to repay him since 1984 and that lender Jenson testified that he did not care whether Mitkovski paid him any interest on the loans. None of this testi-

mony suggest a waiver of principal or interest. Thus, assuming *arguendo,* that the statute of limitations may have run on all or part of the loans, and further, assuming these statements, made during a trial by the lenders, it appears to me that these were not significant statements of waiver of either principal or interest. Rather, in context, they were statements of the lenders' faith in the probity and honesty of Mitkovski and did not indicate a serious waiver of their rights to either interest or principal. Thus assuming that waiver could be had, the evidence does not support Respondent's claim of waiver. (b) Respondent also argues (Respondent's brief page 30), that since the interest on many of the loans was at a maximum rate of 7 percent, Respondent should not be obligated to pay any higher rate of interest on any backpay than the 7 percent figure if it should pay any interest whatsoever. In support of this contention, Respondent cites *NLRB* v. *My Store, Inc.;* 468 F.2d 1146 (C.A. 7, 1972); 81 LRRM 2225, 2229. That case, however, is distinguishable on its facts. In *my Store, Inc.,* the Union had advanced monies to unfair labor practice strikers in the form of loans that were equivalent to the claimants take-home pay. The court held, *inter alia,* that interest should not have been allowed by the Board on that part of the backpay awards which represent lost wages for the periods when the Union advanced loans that were equivalent to the claimant's take-home pay. *In that case, the Union loan agreements specifically provided that the loans should bear no interest.* The court held that it would be inequitable to required the Respondent to pay interest on the sums represented by loans since the claimants themselves suffered no loss of the use of these monies. In the instant case, however, the loans, of course, were not shown to be the equivalent of any claimant take-home pay. In addition, none of the loan agreements pro-

vided that the loans should bear no interest. Here, the loans do bear interest, have not been waived, and notwithstanding the possibility that the statute of limitations may have run on some of them, that is the lender's affirmative defense at law which does not destroy Mitkovski's right, indeed obligation, to repay the loans. Thus *NLRB* v. *My Store Inc., supra,* is distinguishable.

In addition, the Board, both in *Florida Steel Corporation,* 231 NLRB 651 (1977) and in the recent *New Horizons for the Retarded, Inc.,* 283 NLRB No. 181 (1987) adopted interest rates on backpay enforcing a national, statutory policy. This policy, according to the Board, is supported by the desire to encourage timely compliance with Board Orders, discourage the commission of unfair labor practices, and more fully compensate discrimnatees for their economic losses.[12]

Respondent's argument which would vary the statutory interest rate prescribed by the Board not only fails to meet the Board's above-stated statutory objectives, but would vary the amount of interest based upon mere private arrangements of the lenders and discriminatees. Aside from the administrative burden thus imposed in deciphering such agreements, there remains the paramount question whether Respondent would be bound to the same position it now urges if the private, agreed interest rate on the Mitkovski loans substantially *exceeded* the Board's *New Horizon* interest rate. For these reasons, I reject Respondent's variable interest

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12 **Under the holding in *New Horizons for the Retarded, Inc., supra,* interest is computed at the "short-term Federal Rate"for the underpayment of taxes as set out in the 1986 amendment of 26 U.S.C. section 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).**

rate argument on administrative, statutory and equitable grounds.

Based upon the evidence adduced in the supplemental backpay proceedings, and my above findings, I conclude that Respondent has failed to prove that Mitkovski failed to disclose, whether intentionally or unintentionally, any interim earnings. I further conclude that Mitkovski's reported interim earnings, together with the unemployment compensation funds, and the loans he received, substantially eliminates an inference of wrong-doing (failure to report interim earnings) on Mitkovski's part which might otherwise flow from the discrepancy between Mitkovski's reported interim earnings and what he would have earned had he not been discharged; and that the evidence, considered as a whole, fails to show, under Respondent's burden, that Mitkovski failed to make reasonable efforts to find interim employment.

In view of these findings and conclusions, I reafirm the Recommended Order I issued on 3 July 1985 except to the extent that interest shall be accrued, as provided in *New Horizons for the Retarded, Inc.*, 283 NLRB No. 181 (1987) on the sum of $93,648.73 accruing after 1 January 1987 (the effective date of *New Horizons for the Retarded Inc., supra*).

Dated, Washington, DC 11 March 1988

/s/ Robert W. Leiner
Administrative Law Judge

DECISION

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed May 11, 1987)

(NATIONAL LABOR RELATIONS BOARD, Petitioner, v. OVERSEAS MOTORS, INC., Respondent — No. 86-5225; ON PETITION for Enforcement of an Order of the National Labor Relations Board)

Before: KENNEDY, JONES and NORRIS, Circuit Judges

KENNEDY, Circuit Judge

Petitioner National Labor Relations Board ("NLRB" or "Board") seeks enforcement of its supplemental order requiring respondent Overseas Motors, Inc., ("Overseas") to give back pay to an employee, Miroljub Mitkovski, who was unlawfully discharged from his job as an automobile mechanic. Overseas argues that: (1) its due process rights were violated; (2) the administrative law judge ("ALJ") behaved in a biased or prejudiced manner; (3) the back pay formula used by the General Counsel was inappropriate considering the alternatives available, the mitigating circumstances, and Mitkovski's interim earnings; and (4) Mitkovski was not entitled to any back pay or, in the alternative, that Overseas' back pay formula should have been adopted. We find that the ALJ impermissibly restricted Overseas' cross-examination of Mitkovski regarding his interim earnings, thereby depriving Overseas of a fair hearing. Accordingly, we DENY enforcement of the present back pay award.

On November 23, 1982, this Court enforced the Board's original decision and order in this case. *See NLRB* v. *Overseas Motor, Inc.*, 741 F.2d 570 (6th Cir. 1983)

The Board had found that Overseas had unlawfully threatened, suspended, and ultimately discharged Mitkovski in violation of 29 U.S.C. § 158(a)(4) because he had contacted the NLRB and had filed a charge against Overseas. *See Overseas Motors, Inc.*, 260 NLRB 810, 109 LRRM 1225 (1982). The Board ordered, inter alia, that Overseas offer Mitkovski full reinstatement and make him whole for any loss of pay he may have suffered as a result of being unlawfully suspended and discharged.

Despite the order of enforcement, Overseas refused to reinstate Mitkovski. After this Court issued an order to show cause why Overseas should not be held in civil contempt, Overseas agreed to reinstate Mitkovski on July 11, 1984. The contempt proceeding was dismissed without prejudice.

The parties were unable to agree on the amount of back pay due Mitkovski and so a back pay proceeding was begun. On November 7, 1984, the Board's Regional Director for Region 7 issued a back pay specification and a notice of hearing. A back pay hearing was held before an ALJ between February 13 and March 12, 1985. During the hearing, the Board filed an amended back pay specification.

On July 3, 1985, the ALJ issued his supplemental decision fixing the amount of back pay. The ALJ adopted the General Counsel's formula — a projection based on a "representative employee" whose wages were similar to Mitkovski's prior to his discharge. The ALJ agreed with Overseas that the "base period" for comparison advocated by the General Counsel was inappropriate and instead chose a shorter period during which the two employees' wages were equivalent. The ALJ accepted the amount of interim earnings discovered by the General Counsel and determined that Mitkovski was entitled to $98,648.73 in back pay, plus interest. The Board

issued a Supplemental Decision and Order affirming the ALJ's rulings, finding, and conclusions, and directed Overseas to make Mitkovski whole in the amount determined by the ALJ. *See Overseas Motors, Inc.*, 227 NLRB No. 61, 121 LRRM 1309 (1985).

Overseas argues first that the ALJ was biased or prejudiced against it and that as a result Overseas was denied due process. Overseas complains that the ALJ

> inserted himself, warped the orderly presentation of the case of [Overseas], encouraged the General Counsel, assisted in the making of objections, lead [sic] the inquiry into areas where counsel for [Overseas] had been precluded from making inquiry, displayed frustration and impatience with witnesses including the principal of [Overseas], allowed General Counsel to impeach his own witness, made unilateral determinations without foundation as to the credibility of witnesses, allowed testimony which could only have qualified as rebuttal but which came through in the hearing as outside the scope of rebuttal, and in every way inserted himself into the proceedings to the point where even the pretense of impartiality had disappeared.

Respondent's Brief at 12.

Although we cannot approve of the ALJ's conduct of the hearing, there was no due process violation. It appears that the ALJ was dealing with a very difficult situation. At least one of the major witnesses, Mr. Demrovksy, an officer of Overseas, was a difficult witness. His testimony was confusing, at best, and sometimes inconsistent. Moreover, the attorneys themselves were contentious and argumentative. The transcript of the

hearing to set back pay for a single employee is 957 pages plus 38 exhibits.

Although the ALJ did participate actively in the questioning, much of that participation was necessary to clarify the record. An ALJ can interrupt or question witnesses in order to clarify testimony. *See NLRB* v. *Honaker Mills*, 789 F.2d 262, 265 (4th Cir. 1986); *NLRB* v. *Air Flow Sheet Metal, Inc.*, 396 F.2d 506, 508 (7th Cir. 1968); *Bethlehem Steel Co.*, v. *NLRB*, 120 F.2d 641, 652 (D.C. Cir. 1941). Although the ALJ did on one instance encourage the General Counsel to make an objection, *see* Joint Appendix at 75-76, he did the same for Overseas' counsel at another point. *See* Joint Appendix at 11-12. The ALJ also rebuked the General Counsel on occasion. *See, e.g.*, Joint Appendix at 116. In short, the ALJ appeared to treat each side the same. We see no evidence that the ALJ was biased or prejudiced.

Overseas next argues that the back pay formula used by the Compliance Officer and the ALJ was inappropriate, given the alternatives available, the mitigating circumstances, and Mitkovski's interim earnings. The Board calculated Mitkovski's back pay using the "representative employee" method. Under this method, the earnings of the discriminatee and some other, representative, employee are compared during some base period when both were working. The resulting ratio is multiplied by the representative employee's earnings during the period in which the discriminatee was unlawfully deprived of work. This "gross back pay" figure is then reduced by the amount of the discriminatee's interim earnings or other deductions established at trial by the employer, resulting in the "net back pay" figure, subject to the employer's other defenses. The Sixth Circuit has approved the use of the "representative employee" approach in the past, *see, e.g., NLRB* v. *S.E. Nichols of*

Ohio, Inc., 704 F.2d 921, 924 (6th Cir.), *cert denied*, 464 U.S. 914 (1983), and we find it to be a reasonable means of calculating back pay in this instance as well.

We reject Overseas' contentions that Mitkovski is not entitled to any back pay. Overseas is attempting to relitigate issues previously decided against it in the unfair labor practices proceeding, and it is not permitted to do so now. We also reject Overseas' contention that the ALJ should have adopted its back pay formula, which would have resulted in a lower back pay award than that determined by the Board. The Board has broad discretion in fashioning the back pay remedy, and its order cannot be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fiberboard Paper Prod. Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964) (quoting *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943)). The Board's discretion extends to determining what method should be used in calculating the back pay award:

> A back pay award is only an approximation, necessitated by the employer's wrongful conduct. In any case, there may be several equally valid methods of computation, each yielding a somewhat different result . . . The fact that the Board necessarily chose to proceed by one method rather than another hardly makes out a case of abuse or discretion.

Bagel Bakers Council of Greater New York v. *NLRB*, 555 F.2d 304, 305 (2d Cir. 1977). The Board is required only to adopt a formula which will give a close approximation of the amount due, *see NLRB* v. *Brown & Root, Inc.*, 311 F.2d 447, 452 (8th Cir. 1963); it need not find the exact amount due. We see no grounds for overturning the Board's choice of a formula.

We also find no merit in Oversea's argument that the Compliance Officer had a duty to investigate the sources and amounts of Mitkovski's possible interim earnings, and that his failure to do so was error. Overseas clearly did not comprehend its burden of proof in the back pay proceeding. The General Counsel has a duty only to show the gross amount of back pay due, i.e., the amount of money that the employee would have earned had the employer not violated the National Labor Relations Act. *See S. E. Nichols,* 704 F.2d at 924. Once he has done so, "the burden is upon the *employer* to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability." *NLRB* v. *Reynolds,* 399 F.2d 668, 669 (6th Cir. 1968) (emphasis added; citations omitted); *see also S. E. Nichols,* 704 F.2d at 924.

However, we do find Oversea's argument that the ALJ impermissibly restricted the cross-examination of Mitkovski regarding his interim earnings to be valid. Mitkovski admitted that he did auto repair work at his home during the back pay period. (He was licensed by the State of Michigan to do such repair work for at least the last two years of the back pay period.) He acknowledged that he kept no records of that work or the amount he earned. He estimated his earnings from that work to be a total of $ 12,000. (His total interim earnings, including part-time work for another repair shop, were $ 14,621.16; unemployment compensation was an additional $ 4,061.) His wife was not employed outside the home. Nevertheless, he made mortgage payments and supported his wife and two sons. He testified that he spend about $ 2,000 a month, which would amount to $ 96,000 for the four-year period. (The ALJ found that Mitkovski must have lived on a minimum of $ 9,000 per year. However, the only testimony regarding his living expenses is Mitkovski's, who said it cost him $ 2,000 a month.)

There is the suggestion that Mitkovski claimed loans of $70,000 to account for the discrepancy between his income and his expenditures. The ALJ prohibited Overseas from questioning Mitkovski about these loans, on the ground that loans are not income. Indeed, during Oversea's examination of Mitkovski, the ALJ sustained objections even to questions regarding Mitkovski's living expenses. It was only after Mitkovski had testified on later examination by the General Counsel that he estimated his interim earnings by figuring out what he spent and what he borrowed that Overseas was permitted to ask questions about such expenditures, and this inquiry was cut off after Mitkovski gave just the $2,000 per month figure. Further, the ALJ would not permit inquiry regarding other expenditures. Mitkovski took four trips to Yugoslavia during this period, two of them with his entire family. The ALJ also prohibited cross-examination about Mitkovski's relationship with a wine-importing business after he testified that he had no earnings from the business, even though he was a registered salesman for the company with the State of Michigan. Overseas was entitled to make full inquiry about Mitkovski's expenditures and the source of those funds, especially since he kept no records of the repair work he did at his home. None of the loan money or the money earned from repairs was reflected in his bank account records.

We agree with Overseas that the ALJ erred in prohibiting cross-examination regarding Mitkovski's expenditures and the source of almost $100,000 spend on living expenses and overseas trips. The failure to keep any records of the repair work he acknowledges doing at his home together with the failure to use his bank accounts are suspicious circumstances about which Overseas was entitled to closely question Mitkovski. Overseas was also entitled to inquire about Mitkovski's

relationship to the wine-importing company and any services he rendered to it, whether he received a salary or not. He could have been paid for services by a trip to Yugoslavia for himself and his family — not an inconsiderable expense. The ALJ's refusal to permit such inquiry denied Overseas a fair hearing and requires that we deny enforcement of the present back pay award.

Overseas also relies on *NLRB* v. *Pugh & Barr, Inc.*, 207 F.2d 409 (4th Cir. 1953). There, the court refused to enforce an order of back pay to an employee when the employee's interim earnings were $294.20, just 5.73% of the earnings of the representative employee over the same period. The court found it "incredible" that the employee could not have earned more if he had made reasonable efforts to find work and stated that "[t]he awarding of so large a sum as back pay without the finding of special circumstances justifying it cannot be sustained." 207 F.2d at 410. (On remand, the court reinstated the back pay award after a showing that the employee's low interim earnings were a result of his age and a job shortage in the area, rather than his own unwillingness to find a job. *NLRB* v. *Pugh & Barr, Inc.*, 231 F.2d 558 (4th Cir. 1956). Here, Mitkovski claimed $14,621 in interim earnings, 13.52% of the $108,170 earned by the representative employee during the same period. Because we do not know what cross-examination would disclose, we do not know whether special circumstances here explain what might otherwise appear incredible.

Overseas raises numerous other factors which it contends should have reduced its back pay liability. We have reviewed these issues and find no error in the Board's treatment of these matters.

Accordingly, we DENY enforcement of the present back pay award. We remand the action to the board so that it may conduct further proceedings in accordance with this opinion.

SUPPLEMENTAL DECISION AND ORDER

(Before the National Labor Relations Board)

(Dated November 19, 1985)

277 NLRB No. 61

DJB
D-3285
Livonia, MI

(OVERSEAS MOTORS, INC., and MIROLJUB MITKOVSKI, an Individual — Cases 7-CA-18251; 7-CA-18355; 7-CA-18477)

On 3 July 1985 Administrative Law Judge Robert W. Leiner issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions and to adopt the recommended Order.

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[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties

[2] The Respondent contends that the judge's rulings and conduct of the hearing demonstrated bias against the Respondent. We disagree. Our review of the record reveals no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated any bias. Contrary to the Respondent's contention, we find that the Respondent was accorded due process, including a fair hearing in all respects. We further find, in agreement with the judge, that the Regional Compliance Officer exhibited no bad faith, bias, or prejudice against the Respondent in formulating the back pay specifications in this case.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear pre-

concluded on page A-108)

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Overseas Motors, Inc., Livonia, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. 19 November 1985

Donald L. Dotson, Chairman
Wilford W. Johansen, Member
Marshall B. Babson, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

(*continued from page A-107*)

ponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

SUPPLEMENTAL DECISION

(Before the National Labor Relations Board — Division of Judges)

(Dated July 3, 1985)

(OVERSEAS MOTORS, INC., Respondent, and MIROLJUB MITKOVSKI, An Individual, Charging Party — Case Nos. 7-CA-18251; 7-CA-18355; 7-CA-18477)

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge: On 20 October 1981, Administrative Law Judge Lowell Goerlich issued his Decision in the above-captioned proceeding and on 11 March 1982, the Board adopted the Judge's Decision and Recommended Order (260 NLRB 810), with modifications not pertinent herein. On 23 November 1983, the Unites States Court of Appeals for the Sixth Circuit enforced the Board's Order in its entirety (721 F.2d 570). The Board Order, as enforced, required, *inter alia,* that Respondent offer reinstatement to and make whole the Charging Party, Miroljub Mitkovski, an individual, for any loss of earnings he may have suffered by reason of Respondent's unlawful conduct against him by payment to him of backpay plus interest, equal to that which he would have earned less interim earnings, if any, from the date of his unlawful termination to the date of an unconditional offer of reinstatement, to be computed in the manner prescribed in *F.W. Woolworth Co.,* 90 NLRB 289 (1950). Interest on any such backpay was to be computed as specified in *Florida Steel Corp.,* 231 NLRB 651 (1977) and *Isis Plumbing & hearing Co.,* 138 NLRB 716 (1962).

A dispute having arisen over the amount of backpay due the claimant under the Board's Order, the Regional Director, Region 7 of the National Labor Relations

Board, on 7 November 1984, issued a Backpay Specification and Notice of Hearing to which Respondent duly filed an answer. During the hearing, I granted General Counsel's motion to amend the backpay specification which was thereafter amended and filed on 26 February 1985. Respondent filed a timely answer to the amended backpay specification on 4 March 1985. The hearing in this matter took place on five occasions on and between 13 February and 12 March 1985. At the hearing, all parties were represented by counsel who enjoyed full opportunity to present evidence, examine witnesses both in direct and cross-examination, and make argument on the record. At the close of the taking of testimony, counsel for the parties waived final argument and elected to submit post-hearing briefs. Thereafter, the parties submitted timely briefs which have been fully considered.

Based on the record as a whole, including my observation of the witnesses and their demeanor as they testified, and upon consideration of the post-hearing briefs, I make the following findings and conclusions.

I.

BACKGROUND

The introductory allegation of the original and amended backpay specification alleges that the gross backpay due to the Charging Party is the amount of earnings he would have received but for the discrimination against him. In Respondent's original and amended answer, Respondent denies the allegation therein and alleges that (a) there was no discrimination against the Charging Party and, moreover, the Charging Party was entitled to no backpay because he was unemployable; because of (b) a poor driving record, lack of driver's license and lack of mechanic's license, and (c) because his suspended driver's license rendered him uninsur-

able or insurable only at rates greatly in excess of standard insurance rates. Respondent further argues that (d) to have employed the Charging Party under these circumstances would have caused Respondent to lose its own license as an automobile repair facility because it would be operating in violation of a Michigan statute. Further, *arguendo,* Respondent argues (e) that the alleged interim earnings in the Backpay Specification should be further reduced by other interim earnings including unemployment compensation payments. Moreover, the answer and Respondent's brief put in issue both the (f) formula, derived from the base period, with regard to the calculation of gross backpay and (g) the use of a particular "representative" employee during the backpay period on which to apply the base period formula.

Indeed, one of the few things upon which the parties agree is the backpay period itself. The backpay period commenced 15 September 1980 when the Charging Party was discriminatorily suspended and, except for periods of intermediate reinstatement on at least two occasions thereafter, the exact configuration and dates being in dispute, the backpay period then commenced again 23 October 1980 when the Charging Party was discriminatorily discharged and continued until 11 July 1984 when he was offered reinstatement to his former position. In fact, the period between the date of entry of the court decree (23 November 1983) enforcing the Board order requiring reinstatement, and 11 July 1984, when Respondent actually offered reinstatement, was occupied by proceedings by the Board in civil contempt, bringing to the Court's attention Respondent's failure and refusal to comply with the Court's 23 November 1982 reinstatement Order. I mention this fact particularly to underscore both the hostility which, from Respondent and Charging Party, pervaded the testimony of the witnesses in this proceeding carrying over from the underlying unfair labor practice case and

the skepticism with which I regarded almost all the testimony. The effect of such hostility, of course, bears on the credibility of the witnesses.

II.

THE BASE PERIOD; BACKPAY FORMULA AND GROSS AND NET BACKPAY

A. The Contentions Of The Parties

The General Counsel utilized as the "appropriate measure of gross backpay for the Charging Party" (par. 3(a) of the amended backpay specification) a *ratio* created by dividing the average weekly commissions earned by the Charging Party, an automobile mechanic ("a specialty mechanic")[1] for a specified "base" period prior to his discharge. (From week ending 2 May 1980 to week ending 12 September 1980), by the average weekly commissions earned by a fellow automobile mechanic, Arthur Miruzzi (a "master mechanic" for the same specified "base" period. This fraction was then applied to and multiplied against the total quarterly earnings, including vacation pay, of Arthur Miruzzi as a "representative employee" during the backpay period (15 September 1980 to 11 July 1984). In its original configuration in the first backpay specification, this base-period ratio of the Charging Party's earnings to Miruzzi's earnings equaled 131.26 percent.

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[1] **The State of Michigan licenses and prescribes "specialties" for mechanics. State of Michigan Motor Vehicle Service & Repair Act, PA300 (1976).**

There are eight (8) "specialties: Tune-up; front-end alignment; brakes; transmission; automatic transmission; engine repair; differential and rear axle; and heating, air conditioning. After 1981, no major repair could be made in these specialty areas unless performed by a state-certified mechanic or by a trainee holding a "permit" and working under a Master Mechanic (certified in the eight specialties). As Fred J. Pirochta, Michigan Director of Repair Facilities, testified that the State routinely and immediately grants trainee permits.

This base period selected by General Counsel, as above noted, commenced with the payroll period ending 2 May 1980. This starting date was chosen by General Counsel, according to the testimony of the Regional Director's Compliance Officer, because it was at this point that Charging Party Mitkovski ceased receiving pay as an assistant shop foreman or service manager and reverted to pay as a mere automobile mechanic. The base period ends with the payroll period ending 12 September 1980, the date on which Respondent embarked on its unfair labor practices against the Charging Party. Applying this ratio (Schedule "A") to Miruzzi's earnings in the calendar quarters in the backpay period (the third quarter in 1980 through the third quarter, 1984) (Schedule "B"), meanwhile deducting therefrom the alleged interim earnings (Schedule "C"), the original backpay specification showed net backpay of $ 131,351.84. At the hearing, this figure was at the outset reduced, by diminutions from gross backpay in certain quarters in 1981, 1982 and 1984, to $ 127,639.53.

Later in the hearing, between 13 February and 15 February 1985, the General Counsel alleged that he had discovered, on notice from Respondent, that certain documents supplied by Respondent, utilized in the computation supporting the Backpay Specification, did not accurately reflect the base period earnings of employee Arthur Miruzzi. It was upon the discovery of these alleged mathematical errors that I granted General Counsel's motion, without Respondent's objection, to redefine and clarify the gross and net backpay. As above noted, on 26 February 1985, the General Counsel issued an amended backpay specification wherein the ratio (based upon the comparative earnings of Mitkovski to Miruzzi in the above base period (2 May – 12 September 1980) was reduced (to 1.0689), and when multiplied against Miruzzi's earnings during the backpay period

(1980-1984) resulted in a net backpay, taking into account the same interim earnings, of $101,740.83. When Respondent then demonstrated that, nevertheless, there existed a mathematical error with regard to the computation of gross backpay for the third quarter of 1981, the General Counsel agreed and thereafter reduced the net backpay figure, at the resumed hearing, to $101,105.93.

Respondent's preliminary contentions as above noted are: (1) that there is no backpay whatever due to the Charging Party because of no discrimination against him. That defense in not available to Respondent because, as I mentioned on several occasions in the hearing to Respondent, the findings and order in the underlying case, including enforcement in the Court of Appeals, demonstrated that Respondent was responsible for backpay because of discrimination against Mitkovski. That issue in this mere supplementary proceeding has been resolved and is the "law of the case," *NLRB* v. *Laredo Packing Co.*, 730 F.2d 405 (C.A. 5, 1984); 116 LRRM 2128. Respondent may not relitigate that defense in a supplementary proceeding to determine the amount of backpay.

Respondent's further defense (2) is that the base period ratio formulated by dividing Mitkovski's earnings by Miruzzi's earnings is not an appropriate use of this device because Mitkovski was a mere "specialty" mechanic whereas Miruzzi was a "master" mechanic, both having different qualifications, different pay rates and performing different functions. Indeed Respondent notes that Michigan law[2] prohibits Respondent from permitting a mere specialty mechanic to perform work which is not within his various specialties but that a master mechanic is allowed to practice his trade in all of the specialties. Thus, Respondent urges, it is mixing

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[2] See footnote 1, *supra*.

apples and oranges to compare the earnings of Mitkovski (a specialty mechanic) with the earnings of Miruzzi (a master mechanic). Instead, Respondent urges that if there is any backpay due to Mitkovski at all, both the appropriate, base period ratio and the backpay period application would be based upon employees of the Respondent who had "comparable qualifications and held comparable positions to that of the Charging Party" (par. 3(a), Respondent's amended answer; br., p. 48 *et seq.*). In this regard, Respondent points to its having hired, on various occasions during the 4-year backpay period, several specialty mechanics whose average wages should be the wages used to create a gross backpay figure for Mitkovski. Respondent's amended answer, paragraph 12, *et seq.*, and brief, page 49, would demonstrate that by utilization, during the backpay period, of the average earnings of specialty mechanics, the gross backpay would not exceed $61,772.28.

Moreover (3) the Respondent, in its answer and brief, repeatedly further attacks the General Counsel's selection (though the Region's Compliance Officer) of the 2 May 1980-12 September 1980 base period as being one chosen in bad faith or by caprice because it creates a ratio which is the highest of any of nine possible ratios which could have been selected and that this selection, whether in bad faith, ignorance, or merely arbitrary, should not be accepted.[3] Thus, for instance, Respon-

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[3] **Whatever the alleged unsuitability in General Counsel's selecting a base period and a formula, my observation of the demeanor and testimony of the Compliance Officer disclosed no suggestion of bad faith, caprice or negligence. There is no evidence to support Respondent's repeated allegation that the Compliance Officer demonstrated hostility to Respondent in the choice of the backpay period, the multiplying formula, a failure to fully investigate interim earnings and other alleged wrongdoing. In its brief, Respondent also alleges that the undersigned was guilty of bias and prejudice. As to that allegation, I refer Respondent to the Board's Rules and Regulations, Series 8, as amended, and refer the Board to the record herein.**

dent asserts that if the base period were actually 5 September 1980 to 12 September 1980, the ratio would be in Miruzzi's favor as a mere 73.54 percent when multiplied against Miruzzi's backpay period earnings. If the base period were 1 August 1980 through 12 September 1980, the base period ratio would be a mere 69.6 percent. If the period were 4 January 1980 through 12 September 1980 it would be 105.64 percent. By General Counsel choosing the base period 2 May 1980 to 12 September 1980 the ratio is 106.98 percent, the highest ratio. The Regional Director's compliance officer testified that the selection of this period derived only from an unbroken, lengthy period during which, and commencing when, neither Miruzzi nor Mitkovski received any additional monies for supervisory functions and ending with Respondent's engaging in its first unlawful conduct against Mitkovski.

There is no dispute that, at the beginning of the base period, in or about 5 May 1980, Miruzzi, a master mechanic, certified in all eight specialties, was receiving from Respondent hourly wages at the rate of $10.10 per hour. At the same time, the Charging Party, Mitkovski, a mere specialty mechanic, was receiving hourly wages at the rate of $10.60 per hour, a 50-cent per hour difference in favor of the mere specialty mechanic, Mitkovski. In addition, Respondent was paying Mitkovski an additional 60-cents per hour to act as assistant foreman in the shop. In fact, therefore, Mitkovski's gross hourly pay was actually at the rate of $11.20 per hour compared to Miruzzi's $10.10 per hour. It is the 60-cents per hour which Mitkovski was being paid as assistant foreman, eliminated at the beginning of the base period, in or about 5 May 1980, which caused the Regional Director's compliance officer to choose that date for the purpose of commencing the base period for comparing Miruzzi's and Mitkovski's wages ($10.60 to $10.10). As the Board

and the Court of Appeals noted, it was on 12 September 1980 that Respondent gave a pay raise to all of its employees, the highest paid of all mechanics, Mitkovski, receiving a pay raise of only 60-cents per hour (thus raising him to $11.20 per hour) whereas the other mechanics received greater pay increases so that Miruzzi, the master mechanic, was receiving $11.20 per hour, the same pay rate as Mitkovski.[4]

The Court of Appeals noted that, in granting the pay raise, Respondent stated that the pay raise stood regardless of the wishes of any of the employees and regardless of any suggestions that they were being in any way unfairly dealt with.

In addition, the Board, affirming Judge Goerlich (and thereafter particularly sustained by the Court of Appeals) found that Respondent threatened that if Mitkovski complained to the Labor Board he would not thereafter receive ". . . any desirable assignments"; and that Respondent considered Mitkovski to be a "good" auto mechanic. In this latter regard, in addition, the Court of Appeals also affirmed the Board's finding that Respondent had unlawfully threatened Mitkovski that he would ". . . not get any jobs to make enough living so [he] would fire himself.[5]

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[4] It was this pay raise, inequitable in Mitkovski's eyes, that sent him to the Labor Board, resulting in Respondent's commission of the unfair labor practices. During the base period other specialty mechanics received $9.50/hour compared to Mitkovski at $10.60/hour (with an additional $.60/hour as an assistant supervisor.

[5] The Court of Appeals sustained the Board's finding that Respondent unlawfully suspended Mitkovski for two days on 15 September 1980 and three days on 16 October 1980. Any dispute that Respondent has raised in this backpay proceeding upon an assertion that the length of these two intermediate suspensions (before the 23 October 1980 discharge) was incorrectly found may not be litigated in light of the Board's and the Court's contrary findings.

DISCUSSION AND CONCLUSIONS

1. Base Period And Backpay Period Projections

(a) Base Period; Backpay Formula (ratio):

As noted in *East Wind Enterprises,* 268 NLRB 655, an administrative law judge must consider conflicting backpay formula arguments and select the most accurate method of determining backpay.[6] In selecting the most accurate method uncertainties will be assessed against the wrongdoer. Thus, the Board has rejected theoretical formulas for determining backpay offered by various Respondents which, while internally consistent, do not reflect the realities of the events involved.

As I view the evidence, I conclude, as Respondent argues, that the use of a protracted base period is unnecessary in this case notwithstanding that the General Counsel's Compliance Officer's testimony demonstrates a rational and good-faith choice in selecting the base period notwithstanding that it results in the highest ratio. As noted, this period was selected because it eliminated, commencing 5 May 1980, any inflation in Mitkovski pay based upon his additional pay as an assistant shop foreman. The facts, without contradiction, show that prior to Respondent's unlawful discrimination, Mitkovski, a mere specialty mechanic, was considered not only a good mechanic, but in the every day work-place evaluation of the worth of work, i.e., rate of pay, the superior of Miruzzi. Thus, over an extended period, Respondent, without regard to supervisory pay, paid Mitkovski at a higher rate as a mere specialty

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6 It follows that, as directed in *East Wind Enterprises, supra,* calculations offered by each party and determine which formula and what calculations produce the most accurate gross backpay amount, keeping in mind that uncertainties must be resolved against Respondent whose illegal conduct . . . "produced both the uncertainties at issue and the injury the instant litigation is intended to remedy."

mechanic than it did Miruzzi, whom Respondent asserts, is Mitkovski's superior because Miruzzi is a "master mechanic." In so far as payment of wages reflects Respondent's own estimate of comparative value, I reject Respondent's argument that the use of Miruzzi's earnings is improper. It is apparent that during the pleaded four (4) month base period, Mitkovski was paid at the rate of $10.60 per hour whereas Miruzzi, supposedly his functional superior, was paid a mere $10.10 per hour.

The record therefore shows, without contradiction, that during the base period, Respondent, whether as a matter of informed business judgment or otherwise, favored Mitkovski, up through 5 September 1980, with a higher wage rate, notwithstanding that Mitkovski was a "mere specialty mechanic." This Respondent evaluation, in terms of the superior wage rate and earnings paid to Mitkovski, I regard as exceptionally strong evidence to support the finding that Mitkovski, regardless of other specialty mechanics, was paid more than master mechanics. I reject Respondent's arguments that (1) Mitkovski should not be compared to Miruzzi because of their distinctive qualifications; and that (2) regardless of the base period, during the 4 years of the backpay period, speciality mechanics were paid less than Miruzzi and the other master mechanics. I find and conclude that prior to the onset of unlawful discrimination, Respondent valued Mitkovski as a mechanic worthy of pay superior to Miruzzi. It is clear from the Board's and Court of Appeal's decisions that Respondent used its discretion in assigning work to Mitkovski as a "good" mechanic. It is also clear on this record that he could and did make money most often equal to or surpassing Miruzzi notwithstanding Mitkovski's more limited qualifications. There is no suggestion in the evidence that any of the specialty mechanics thereafter hired in the

backpay period were viewed by Respondent as "good" mechanics or in any event, the equal, much less the superior of Mitkovski. Lastly, only Miruzzi was employed throughout the base period and backpay period.

Mitkovski's unlawful discharge makes it impossible for us to know whether Respondent might have applied a different, and perhaps a stricter, wage standard to Mitkovski during the 4 years of the backpay period by lowering his wages to rates enjoyed by specialty mechanics first hired in the backpay period. It is a matter of speculation. This uncertainty must be resolved against Respondent since it was Respondent that created this situation. *NLRB* v. *The Westin Hotel*, ___ F.2d ___ (C.A. 6, 1985); *NLRB* v. *Miami Coca-Cola Bottling Co.*, 360 F.2d 569 (C.A. 5, 1966). I am, therefore, prepared to find, and do find, that the use of a base-period ratio comparing Miruzzi's earnings to that of Mitkovski is not unreasonable since, regardless of technical qualifications, Mitkovski even when not additionally paid as a supervisor, was an employee whom Respondent favored with a wage rate as high or higher than Miruzzi's, a master mechanic; Mitkovski's base period earnings ordinarily equaled or surpassed Miruzzi's; other base period mechanics were paid less than Mitkovski (i.e., $9,50our compared with Mitkovski at $10.60/hour) and since Miruzzi was the only employee employed during the base period and the entire backpay period.

Yet, as above noted, while I conclude that a Mitkovski/Miruzzi base period ratio is proper, I agree with Respondent that the use of the base period (2 May –12 September 1980) used by General Counsel in computing the ratio is not the most accurate measure of ratio to be used. It cannot be denied that for the payroll period ending 5 September 1980, Respondent fortuitously created, for reasons, on this record, of pure business

necessity, without taint of unlawful considerations, an exact equality in the pay rates of Mitkovski and Miruzzi. Each was paid $11.20 per hour. Thus, the ratio in this short, but untainted period is exactly an integer: that is, with the equality of earnings, the ratio becomes "one". It is therefore unnecessary to use General Counsel's much longer base period, or any other period, to compare their wages. I therefore conclude that the most accurate "base period" use of the comparison between Miruzzi and Mitkovski occurred when Respondent, on this record, equated their wages for purely business reasons, a result which Mitkovski resented and which led ultimately to the unfair labor practices thereafter initiated by Respondent. In any event, I find that the most accurate earnings ratio between these two highest-paid, long-time, skilled employees is the ratio of their earnings in the period both most proximate and prior to Respondent's unlawful conduct, which period, the payroll period 5 September to 12 September, reveals an exact equality of earnings. I therefore conclude that a ratio establishing exact equality of Mitkovski-Miruzzi earnings is the proper and most accurate ratio to be applied in the projected backpay period.

(b) Backpay Period: Miruzzi's Earnings

With regard to the ensuing 4-year backpay period, I have already noted my disagreement with Respondent that the earnings of Miruzzi are irrelevant because Miruzzi was a master mechanic. I accept, *arguendo*, Respondent's arguments that (1) specialty mechanics work only in their specialties whereas master mechanics can do all the work of all specialty mechanics; (2) during the backpay period Respondent experienced almost 50-percent of its work in "tune-ups" and that Mitkovski was not certified in the specialty of "tune-ups"; and that the specialty mechanics hired

during the 4-year backpay period received lower wage rates and earnings than did the master mechanics. The facts remain that the only uncontroverted data and economic experience untainted by Respondent's unfair labor practices in the base period demonstrates that Mitkovski held a favorable position with Respondent. Respondent's testimony in the underlying unfair labor practice case went so far as to describe Mitkovski as a "very good" mechanic, then suspiciously diminished to a mere "good mechanic", the latter finding supported by the Administrative Law Judge, the Board, and the Court of Appeals. It is clear on this record that whatever Mitkovski's deficiencies in specialization as a mechanic, he regularly received, even excluding supervisory pay, during the entire base period pleaded in General counsel's specification, earnings superior to the master mechanic (Miruzzi) whom Respondent thereafter made an assistant foreman. It was only on the date in the payroll period ending 5 September 1980 (announced on 12 September 1980) that Miruzzi reached equality with Mitkovski in wage rate. To suggest that Mitkovski, enjoying this superior position, because of Respondent's use of untainted business discretion in assigning him work which led to his superior earnings, would have been relegated to lesser earnings as a mere specialty mechanic during the 4-year backpay period is to indulge in the very speculation forbidden under Board law.[7] Thus, absent proof by Respondent that the favored veteran, highly paid, Mitkovski, would have been relegated to the pay rates and earnings or newly-hired specialty mechanics, who came and went during the 4-year backpay period, I cannot conclude that Respondent has submitted sufficient evidence to support this defense.

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[7] **I would especially avoid speculating on this uncertainty in the face of Respondent's repeated threats of economic reprisal against Mitkovski if he complained to the NLRB.**

This Respondent defense, in fact, is unsupported by any evidence in this regard outside of the mere naked earnings of the specialty mechanics employed in the 4-year backpay period. As noted, none of these enjoyed Respondent's accolade as "good" mechanics and none of them were employed during the base period so that a reasonable extrapolation could be made to demonstrate how they would have been treated during the 4-year backpay period. The only hard evidence is that Mitkovski's base period wage rates were at least equal to Miruzzi's and higher than all other *specialty* mechanics employed alongside Mitkovski in the base period ($10.60/$9.65). On such evidence, I further conclude that the use of Miruzzi's earnings, the earnings of a "representative employee" working during the entire backpay period, *East Wind Enterprises,* 268 NLRB 655, 656, was an accurate and reasonable method of ascertaining a gross backpay for Mitkovski during the 4-year back pay period,[8] and that because Mitkovski, at all times in the base period, was paid higher than any specialty mechanic and at least as high as any other mechanic, including master mechanics, it would be improper to use, much less average, the earnings in the backpay period of specialty mechanics especially where they were not employed during the entire backpay period. *Compare: Central Freight Lines, Inc.* 266 NLRB

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[8] **To the extent Respondent would diminish Miruzzi earnings in the 4 year backpay period by showing that he was paid monies as a supervisor, Respondent's proof does not establish same. Payment of "policy" hours shows merely payment out of funds (insurance, "house" money) not from customers. Where money paid to Miruzzi for supervisory functions is established, such money should be deducted from any use in determining Mitkovski's backpay. Respondent failed to prove that any backpay period payments to Miruzzi's were for superior functions; and also failed to prove that any payments to Miruzzi were for any service other than to assure a rate of $11.20 per hour. As General Counsel notes, Respondent admitted that Miruzzi was paid the same hourly rate regardless whether working as a mechanic or allegedly overseeing the shop (Tr. 308-309).**

182 (1983) with *Berry-Mahurin Construction, Inc.*, 273 NLRB No. 133 (1984).

RESPONDENT'S DEFENSES:

2. Mitkovski's Loss Of His Driver's License and Uninsurability

The parties stipulated that Mitkovski's driver's license was suspended on 22 October 1980 and reinstated 23 July 1981. In fact, General Counsel conceded that in that period, Mitkovski had no driver's license at all. To that extent, Respondent asserts that since a driver's license was functually necessary for the employment of Mitkovski as a mechanic, it should not be held liable for backpay in any quarter in which Mitkovski was without a driver's license. Mitkovski, without a driver's license, would be unable to certify that his repair work rendered the car fit to operate since he would be unable to drive it and check it out. The problem however, is that Respondent made the same argument in the underlying unfair labor practice case: that, among the reasons for its discharge of Mitkovski, was that Mitkovski had lost his driver's license, or rather had it suspended; that in fact, he was without the ability to legally drive, and that this resulted in a threat by Respondent's insurance carrier to cancel its insurance.

That argument, relating to the cause of Respondent discharging Mitkovski was rejected by the Board and by the Court of Appeals and may not be relitigated under the guise of avoiding backpay in any quarter in which the loss of license occurred. The underlying reason for this conclusion was that the Board and the Court of Appeals found that Respondent employed Mitkovski as a mechanic for long periods when it *knew* that he had a suspended license; was not legally permitted to drive; was nevertheless driving cars he serviced; and in view

of the Board's findings that Respondent testified that it was "doing everything in my power [regarding insurability and license suspension] not to have him terminated." (*Overseas Motors, Inc.*, 260 NLRB 810, 813). The Board and the Court of Appeals quite clearly held that Respondent *concealed* Mitkovski's driving record from it insurance carrier and it was only after he filed charges with the Labor Board that Respondent became "concerned" about Mitkovski's driving record (the quotation marks surrounding "concerned" appear in the Court of Appeals' opinion).

The defense of Mitkovski's loss of driver's license and his resulting uninsurability was explicitly the subject of litigation in the underlying unfair labor practice case. This, in cases where a respondent merely fails to raise a defense which would meet the allegations of unfair labor practice and thus indirectly eliminate the backpay liability (failure to reinstate an employee because of picket line misconduct where the picket line misconduct occurred prior to the hearing in the unfair labor practice proceeding), the Respondent is collaterally estopped from raising that matter as a defense in the backpay proceeding. Compare: *Fiberboard Paper Products, Corp.*, 180 NLRB 142, 149-151, enfd. 436 F2.d 908 (C.A. D.C. 1970), cert. den. 403 U.S. 905 (1971) with *Olson Bodies, Inc.*, 220 NLRB 756, 757.

In the instant case, it is not a matter of mere collateral estoppel, for the defenses of loss of driver's license and resulting loss of insurability were explicitly litigated and expressly rejected in the underlying unfair labor practice case. Thus, I conclude that Respondent is not merely collaterally estopped from raising those defenses in the backpay proceeding but is barred from raising those defenses under the doctrine of "law of the case." The instant backpay proceeding is a continuation

of, and a mere supplement to, the unfair labor practice case. Hence, this proceeding is not a "new" litigation requiring the application, if appropriate, of the rule of collateral estoppel or *res judicata*. Indeed, in the recent *NLRB* v. *Laredo Packing Co.*, 730 F.2d 405 (C.A. 5, 1984), enforcing the backpay order in 271 NLRB No. 88 (1974), the Court noted (116 LRRM 2128, 2130), in its *per curiam* enforcement, where the Respondent's proof, *inter alia*, consisted of a relitigation of its contention that the employer was justified in its failure during the backpay period to offer driving jobs to truckers (because they were uninsurable and that its backpay liability was thereby tolled), that the uninsurability issue had already been decided adversely to the employer in the underlying Board and Court proceeding. The Court held, that rather than applying the doctrine of *res judicata* it would apply the doctrine of "law of the case" and that the uninsurability of the drivers was not a matter to toll backpay liability: that matter had been rejected in the case-in-chief. Likewise, in the instant case, to permit the defenses of loss of driver's license and uninsurability with regard to Respondent's allegation that Respondent's insurance carrier (Central Insurance) would no longer insure him, would be to permit relitigation of the reason for the pretextual discharge under the guise of tolling backpay. This was expressly rejected by the Court of Appeals in *NLRB* v. *Laredo Packing Co.*, *supra* and there have been no reasons advanced here to not apply the rule of that case. Therefore, as a first reason, as a matter of law, I may not entertain Mitkovski's lack of a driver's license or his uninsurability by Respondent's insurance carrier, if true, as a tolling element in this backpay proceeding.

Secondly, as above noted, Respondent demonstrated, in fact, that it would ignore Mitkovski's loss of license and insurability and would even conceal that status in

order to keep him as a mechanic. If it was willing to follow such a course of conduct prior to unlawfully discharging Mitkovski, I find that Respondent has shown no reason it would not have followed the same course of conduct during the backpay period. Thirdly, there was no evidence adduced in this backpay proceeding, nor does the face of the unfair labor practice proceeding show, that Respondent's insurance carrier actually cancelled Respondent's insurance or even threatened to cancel it. Fourthly, there was no effort, on any record herein, demonstrating that Respondent sought to appeal any declaration either by its insurance agent or the insurance carrier that the insurance would be cancelled or that Mitkovski would be excluded. This failure shows that there has been no *proof* that the driver (Mitkovski) was in fact uninsurable. (*NLRB* v. *Laredo Packing Co., supra,* 116 LRRM 2128, 2130) by Respondent's own carrier. Thus, added to "law of the case," and Respondent's avowed willingness to conceal Mitkovski's shortcomings, there is the additional ground that there was no proof that Mitkovski was in fact or in law "uninsurable" by Respondent's own carrier or by any carrier. The burden of proof to show overall insurability is on Respondent. *Overseas Motor, Inc.,* 260 NLRB at. p 151, fn. 12.

The one exception to the use of the argument tolling backpay based on "uninsurability" appears in footnote 12 of ALJ Goerlich's Decision adopted by the Board and enforced by the United States Court of Appeals:

> Respondent is not precluded, in subsequent compliance proceedings, from contending that, after a good-faith exploration of Mitkovski's insurability, he is actually uninsurable with any carrier and that his backpay liability should be commensurably reduced. See *Golden Beverage of San*

Antonio, Inc., 256 NLRB 469 (1981). See Also *Viele & Sons, Inc.*, 227 NLRB 1940, 1950, 1951 (1977).

Although Respondent called as its witnesses its insurance agent (Donald E. Spain) as well as its insurance carrier (David Hoerauf), both admitted that they never sought coverage for Mitkovski with any other insurance carrier; Respondent never requested its agent to place its insurance coverage with any carrier other than Citizen's Insurance Co.; and no effort was made to place Mitkovski's coverage with a high-risk carrier or with a "pool" insurance group which would insure high-risk employees. Moreover, Respondent's carrier, Citizen's Insurance Co. never threatened to cancel Respondent's insurance, never was asked to pass on Mitkovski's insurability and was never presented with the option of ignoring Mitkovski or getting Respondent to waive his coverage. The fact that Respondent's insurance agent (Spain) believed Mitkovski's insurance would cause any ordinary carrier to cancel all of Respondent's liability insurance hardly meets the burden of Respondent proving that Mitkovski was " . . . actually uninsurable with any carrier."

Thus, there is a complete failure of proof that Mitkovski was actually "uninsurable with any carrier" since neither Respondent nor its agent nor its insurance carrier made any effort to see if he would be insurable with "any carrier" within the meaning of the footnoted exception provided by the Board. Thus, not only did Respondent fail to make *any* exploration with regard to Mitkovski's insurability but there has been no showing of a "good-faith exploration" of that issue with any other carrier or agent, with the insurance "pool" or with Citizen's for an exception or a waiver. I thus conclude that there was a failure of proof with regard to the tolling of Respondent's backpay liability based upon Mitkovski's

failure to have a driver's license or his "uninsurability" and that, in fact, in the instant case, as in *Golden Beverage of San Antonio, Inc.* 256 NLRB 469 (1981), Respondent has "used alleged problems involving insurance coverage to mask it real reasons." Thus, there shall be no tolling based on those propositions.

Finally, Respondent argues that even if alternative insurance was available if it continued to employ Mitkovski, the substantially higher cost of the insurance would have placed an unfair burden on the Respondent. There is no proof in this record as to what the asserted "substantially higher cost" of alternative insurance would be and therefore Respondent has failed to meet its burden on this ground as well.

Therefore there shall be no tolling of backpay liability based upon Mitkovski's failure to have a driver's license during the backpay period or his "uninsurability".

3. The Failure Of Mitkovski To Renew His Mechanic's Certificate On 17 October 1980

Respondent notes that Mitkovski failed to renew his mechanic's certificate on 17 October 1980 and that he remained without certification until 3 November 1983 when he did renew it. Respondent argues that to have employed Mitkovski during this period as a mechanic would have violated the Michigan Motor Vehicle Service and Repair Act (Michigan Public Act, 1974, No. 300) and could have led to loss of Respondent's license. Respondent concludes that, the mechanic's certificate having been not renewed for 3 years, Mitkovski was thus rendered unemployable by Respondent in that period and that no backpay could be accrued in that period.

As with the case of the loss of Mitkovski's driver's license as a reason to discharge him, Respondent, in the 22 and 23 July 1981 hearings in the underlying unfair

labor practice case, raised as an additional reason for lawfully discharging Mitkovski, his "horseplay, use of the telephone, an *expired mechanic's license,* and fondling of female customers" (emphasis supplied). These excuses were rejected because the Board found these reasons ". . . had been overlooked by Respondent prior to Mitkovski's contact with the Board and which had not been initially cited as reasons for this discharge," *Overseas Motors, Inc.,* 260 NLRB 810, 813.

Thus, Mitkovski's October, 1980 failure to renew his mechanic's license was actually raised and litigated in the July, 1981 unfair labor practice hearings and rejected. I conclude that, as in the matter of his failure to have a driver's license and his "uninsurability," Mitkovski's lack of a mechanic's license has already been litigated and rejected by the Board and the Court of Appeals. As the "law of the case" it cannot be resurrected in the guise of tolling backpay in this backpay proceeding. Furthermore, in view of Respondent's willingness, prior to its unfair labor practices, to conceal Mitkovski's licensing shortcomings, I conclude it would have continued in such conduct during the backpay period.

The credited and uncontraverted evidence adduced at the hearing was that, under Michigan law, after January 1981 (testimony of Fred J. Pirochta, Michigan Bureau of Automotive Regulation), a mechanic could not perform major repairs unless certified in that specialty *or* unless he obtained a trainee permit to perform the work under a specialty or master mechanic. The evidence is undisputed that a mechanic can immediately receive a "trainee permit" by applying for it and the grant of the permit is a routine matter. Further evidence showed that after January, 1981, a mechanic with a "trainee permit" working under a certified mechanic,

including a master mechanic, could do the major repairs in which he received the "trainee permit."

Mitkovski's failure to have a current mechanic's license was not a deficiency which rendered him inherently unfit for work in the repair facility, such as his being out of the country, incarcerated, or ill. Such conditions would toll Respondent's backpay liability.

As a first conclusion, therefore, to permit Respondent to litigate the question of Mitkovski's failure to have a current mechanic's certificate or license would be to permit relitigation of a defense rejected in the underlying unfair labor practice proceeding in the guise of tolling backpay in the supplementary backpay proceeding. This, the Board rule, enforced by the Courts, prohibits.

Moreover, Respondent may not be heard to argue that backpay should be tolled because of the intervening provisions of the Michigan Motor Vehicle Service and Repair Act, 1976, with relation to tolling the backpay even after 1 January 1981; after the 23 October 1980 discharge. That statute requires, only that an uncertified mechanic work under a master mechanic or a certified mechanic. As in the case of Mitkovski's uninsurability and failure to have a current driver's license, Respondent would be prohibited from now interposing this defense on the theory of "law of the case" or, if it was not actually raised and litigated in the underlying case, on the theory that Respondent would have to be, and is collaterally estopped from raising that defense since it was available to Respondent at the unfair labor practice hearing. Thus, if the statute went into effect in 1976 and if the provisions of the statute requiring uncertified mechanics to work under certified mechanics or a master mechanic went into effect only on and after 1 January 1981, those facts would have clearly been available to Respondent in the unfair labor practice case

which was not heard until 22 July 1981. Respondent's failure to raise the defense of the application of the statute was either, therefore, prohibited as a defense because it was litigated in the underlying unfair labor practice case *Overseas Motors, Inc.*, 810, 813, fn. 10, or should have been interposed as a defense and Respondent is now collaterally estopped. *Fiberboard Paper Products Corp.*, 180 NLRB 142, 149-151, citing Justice Frankfurter in *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219 ("and the Wagner Act does not require that ground be covered a second time, or piecemeal"). Compare: *Olson Bodies, Inc., supra,* with *Rogers Furniture Sales, INc.*, 213 NLRB 834, fn. 8 (1974). In short, since the applicability of the statute commenced in January of 1981 and since the unfair labor practice proceeding did not commence until 6 months later in July, 1981, Respondent's failure to plead and prove the existence and effect of the Michigan Statute must now be collaterally estopped, assuming, *arguendo,* that the matter was not actually particularly raised and litigated in the unfair labor practice case.

Lastly, since the grant of the trainee permit was a matter of mere routine, as Respondent's witness Pirochta testified, Respondent may not toll the backpay since an offer of reinstatement would have presumably cured the licensing defect.

3. [sic, 4] Tolling Of Backpay Because Of Conflicts With Dates Of Layoff In the Board Decision And Court Decree

Respondent, on several occasions, in its pleadings and proof, alluded to the allegedly incorrect statement of conclusions in the Board order and Court decree regarding the duration of Respondent's unlawful layoffs of Mitkovski in September and October, 1980, preceding his 23 October 1980 discharge. This matter likewise was

specifically litigated before the Board and Court and is barred from relitigation under the guise of a tolling Respondent's backpay obligation in this supplementary proceeding. To the extent Respondent argues that periods after the September and October unlawful layoffs but prior to 23 October 1980, when Respondent was not unlawfully suspended, should not be included in the backpay computation of gross backpay, the short answer is that they were not. The third quarter of 1980 was treated entirely as a quarter in which backpay accrued and all of Respondent's payment of wages to Mitkovski were included as interim earnings throughout the period. Thus, Respondent's assertion that periods between the unlawful layoffs and the unlawful discharge should not be included in the computation of gross backpay was rectified by treating the quarter as starting with the payroll period ending 19 September and then including as interim earnings all of the wages paid by Respondent to Mitkovski in that quarter. Thus, all wages paid to Mitkovski represent what Mitkovski actually earned in the quarter during the period of unlawful suspension and therefore takes account of the fact that during that period he was paid by Respondent.

4. [sic, 5] Tolling Because of Periods Of Alleged Uninsurability:

(a) to the extent that Respondent pleaded (Respondent's Amended Answer, p. 6, par. 10) that Mitkovski was unavailable for work during five of six days in the period ending 6 July 1984, that defense, in partial tolling of the backpay computation, was withdrawn during the hearing.

(b) To the extent that Respondent argues that the backpay should be tolled for the pay period ending 8 April 1983, when Mitkovski was unable to work for three of the six days, the Regional Director's Compli-

ance Officer testified that this matter was rectified by the computation showing that Mitkovski was out of the country from 21 November 1982 to 2 April 1983 and that Mitkovski was able to work commencing Monday, 3 April 1983. Respondent called Mitkovski as its witness and Mitkovski thereafter again appeared in rebuttal. There was no testimony, contraverting General Counsel's pleadings and assertations, that Mitkovski was not back in the country on or about 3 April. Under *American Mfg. Co. of Texas*, 167 NLRB 520, 522, in order to toll backpay, Respondent has the burden of showing the periods that discriminatee was unavailable for employment. See: *Greyhound Taxi Co., Inc.*, 274 NLRB No. 60 (1985). I am therefore unable to conclude that Respondent has produced any evidence to show that Mitkovski was not in the country and available for work commencing on or about 3 April 1983. There is no proof, consistent with Respondent's answer (amended answer, p. 6, par. 9), that Mitkovski was unable to work for three of the six days in the pay period ending 8 April 1983. The backpay period may therefore not be tolled on that basis.

5. [sic, 6] Interim Earnings

As noted in *Sioux Falls Stockyard Co.*, 236 NLRB 543, 545, the burden of proof is on Respondent to establish its affirmative defenses including the obligation to show that Mitkovski did not made a *bona fide* effort to seek employment and was therefore willfully idle, *NLRB* v. *Westin Hotel*, ___ F.2d ___ (C.A. 6, 1985), 118 LRRM 3297; *Aircraft and Helicopter Leasing and Sales, Inc.*, 227 NLRB 644, 646; *NLRB* v. *Mooney Aircraft, Inc.*, 366 F.2d 809, 815 (C.A. 5, 1966), and Respondent does not meet that burden by presenting evidence of a lack of an employee's success in the gaining of interim employment or low interim earnings. Rather, Respondent must

affirmatively demonstrate that the employee, Mitkovski, neglected to make reasonable efforts to find interim work, *NLRB* v. *The Westin Hotel,* 267 NLRB 244, enfd. ___ F.2d ___ (C.A. 6, 1985), 118 LRRM 3297; *NLRB* v. *Miami Coca-Cola Bottling Co.,* 360 F.2d 569, 575-576 (C.A. 5, 1966). The alleged discriminatee must make only "reasonable efforts to mitigate the loss of income and not undertake the highest standard of diligence," *NLRB* v. *Arduini Manufacturing Co.,* 395 F.2d 420, 422-423 (C.A. 1, 1968). In determining the reasonableness of the effort, the employee's skills and qualification must be taken into account, *Mastro Plastics, Inc.,* 136 NLRB 1342, 1359.

The backpay specification alleged, and Mitkovski testified that in the approximately 4 years constituting the backpay period, Mitkovski received $4,061 (in the 26-week period following his 23 October 1980 discharge) as unemployment compensation from the State of Michigan. This sum, repayable to the State of Michigan, was not included in Mitkovski's interim earnings. He testified that he received no substantial monies as gifts and lived off loans. He further testified that during the backpay period he was self-employed, worked as a part-time mechanic (Lincoln Park Foreign Car Co.) and as an outside salesman for an employer (Woodruff and Associates) selling "stop a flat" materials in 1981 or 1982.

Mitkovski also testified that commencing in the summer of 1981 he began doing mechanical repairs at his home. He paid a fee for such a right in 1983 and again in 1984. He could not specify how many cars he averaged per week but stated that he averaged at least one car a week and at most. two cars per week but not in every week. He also was unable to say which auto repairs he did at particular times but asserted that he repaired brakes, alternators, and changed oil. In the entire 4 years he worked on two exhaust systems and

did tune-ups. In performing repairs, he charged for his labor only and either had the submitting car owner purchase the parts or he charged the parts to the car owner. With regard to his work at the repair shop of Lincoln Park Foreign Cars, he testified that he last worked there in 1981; that he never wrote down his interim earnings and that the interim earnings that he told the General Counsel of, in preparation of the backpay specification, amounted to about $12,000 in the entire 4-year period.

He further testified that his trips to his native Yugoslavia were either gifts from his relatives or were heavily subsidized by his relatives. Mitkovski also testified that with regard to some of these trips to Yugoslavia, he was licensed as a sales person by Overseas International Co., a business enterprise in the State of Michigan. He testified however, that he never received any pay from Overseas International (engaged in the importation of Yugoslavian liquor).

Mitkovski also testified that prior to his discharge by Respondent, he often was approached by the owners of Lincoln Park Foreign Cars to work for it, but thereafter, after the discharge, Lincoln Park's principals always told him, when he requested employment that there was no work for him.

As a result of Mitkovski's statements to the NLRB, the Regional Office, commencing with the first quarter of 1981 and ending with the third quarter of 1984, determined that Mitkovski earned approximately $13,000 in the 14 quarters in which he was available for employment during the backpay period (other than in the third and fourth quarters of 1980 in which the discrimination occurred). Thus, the Regional Office divided Mitkovski's asserted interim earnings commencing January, 1981 into equal parts, arriving at the figure of $923.07 per

quarter in each quarter he was available for work (thus excluding the first quarter of 1983 in which Mitkovski was out of the country). The grand total of interim earnings was $ 14,621.46 (Schedule "C").

Respondent attacked Mitkovski's veracity and the amount of alleged interim earnings through the testimony of a mechanic with whom Mitkovski worked after being reinstated by Respondent in the summer of 1984.

Thus, Respondent's witness, Howard M .Gardella, testified that he first met Mitkovski when Mitkovski returned to employment. Within a short time, Mitkovski learned that Gardella wanted a different job where he could earn more money and Mitkovski told he that he would try to get him a job at Lincoln Park. This occurred after MItkovski was reinstated, when the principal at Lincoln Park was at Respondent's place of business and told Mitkovski that he was looking for a mechanic. Although Mitkovski took Gardella to Lincoln Park and although Gardella received an offer of employment, Gardella turned it down because Lincoln Park was too far away as a work place and was not offering enough money. However, in various conversations with Mitkovski, Gardella testified that Mitkovski told him that Lincoln Park was a good place to work and that Mitkovski made $ 700 a week at Lincoln Park, being "paid under the table." He told Gardella that he did not want Respondent to know that he had worked there. On several occasions after Mitkovski was unlawfully terminated, he applied for work at Lincoln Park but was turned down.

Although Mitkovski at first testified that he did not recall telling Gardella that he received money under the table, he ultimately admitted that he "might have" (Tr. 861). He absolutely denied having received money under the table from Lincoln Park but he admitted that he might have told that to Gardella to make the job

attractive to Gardella and to have Gardella leave Respondent and thus have more work available for Mitkovski at Respondent. Although Mitkovski denied that he would lie under oath to hurt Respondent, he admitted that he would lie to somebody else (i.e., Gardella) about conditions in order to hurt Respondent (Tr. 262-263).

I find that Mitkovski did *tell* Gardella that he was paid $700 per week "under the table" in order to have Gardella leave Respondent's employ thereby providing more work for Mitkovski. I also credit him that he did not, in fact, either receive $700 per week or $700 per week under the table because I credit his testimony that he in fact did not receive $700 per week at Lincoln Park (or any other place) because he would not leave a job which paid him $700 a week, since such a job would make him a "king today" (Tr. 864). I also credit Mitkovski's further uncontradicted testimony (Tr. 864-865) that prior to his discharge from Respondent, employers were seeking to employ him but that after he filed the charges alleging unlawful action against him by Respondent he went to many dealerships in the Detroit area (which sold Fiat and Lancia cars like Respondent) and these employers told him that they had no opening "at this time" (Tr. 865). I also accept as credible his testimony that he returned to Respondent's employ pursuant to the offer of reinstatement because he could not get a job elsewhere after trying to do so and that his earnings after return have been lower than other employees at Respondent's shop and lower than he previously earned.

In short, I do not find credible evidence that Mitkovski earned $700 a week while employed by Lincoln Park in or about 1981, or any other time, or that he was paid "under the table." Respondent made no effort

to subpoena Lincoln Park's payroll records or personnel in order to contradict or, in any case, to undermine, Mitkovski's denials and assertions.

Other testimony regarding Mitkovski's attempt to engage in the radio business with (Zoran Mihailovich (Tr. 932 *et seq.*)) demonstrated that the use of time bought from a local radio station to entertain the Yugoslav community resulted in a losing proposition (Tr. 934-935). The record shows that Mitkovski, nevertheless, made attempts to earn a living.

I have examined the record with regard to Mitkovski's testimony as to how he supported himself in the 4-year backpay period and I was met principally with $4,000 of Michigan unemployment compensation,[9] $14,000 worth of interim earnings and the remainder, loans. The evidence showed that it took a minimum of approximately $9,000 a year for Mitkovski's expenses and therefore there is an $18,000-$20,000 gap in the 4-year period ($36,000 minus $18,000) in loans and earnings to be explained by "loans." The burden on Respondent, however, is not merely to litigate the question of the existence or non-existence of "loans," but to show that there were other interim earnings or proof of Mitkovski's failure to engage in reasonable efforts to gain interim employment. Mitkovski's uncontradicted testimony was that he sought employment in the Detroit area from Lancia and Fiat dealers who had previously sought him as an employee and was turned down, with the implication that he was being blackballed for having engaged in the activity of prosecuting his NLRB unfair labor prac-

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9 **Respondent persists in alleging General Counsel's and the Compliance Officer's error in not including, as interim earnings, payments of Michigan unemployment compensation to Mitkovski. It has been the law for 35 years that state unemployment compensation payments are not interim earnings and are not deducted from back pay. *Gullet Gin Co.* v. *N.RB*, 340 U.S. 361 (1951).**

tice. It is unnecessary to answer that question but merely to find, as I do, that he sought employment as a mechanic, his trade, while he was engaged in self-employment as a mechanic and a salesman of radio time and a flat-tire cure from his home. His engaging in self-employment did not take him out of the labor market nor prevent him from seeking further employment in the Detroit area as an automobile mechanic.

Nevertheless, Respondent urges that, as a matter of inference, I should conclude that Mitkovski did engage in other interim employment, did receive other net earnings therefrom, and that his lack of credibility on the witness stand demonstrated that he did have such interim earnings and that the backpay should be tolled to the extent that such unreported earnings in any quarter prevent Mitkovski from being considered as eligible for backpay. *American Navigation Co.*, 268 N.RB 426. Respondent's argument, however, does not rest upon proof of Mitkovski failing to report interim earnings, which failure would require elimination of backpay for any such quarter. In the absence of evidence of a failure to disclose, however, there is no substantial evidentiary base on which to erect that inference. Absent such an evidentiary base, and absent such inference, Mitkovski's having lived on loans and modest earnings from self-employment does not, as a matter of proof, necessarily suggest, as a matter of law, or of necessary inference, that he is not disclosing interim earnings. In the absence of such evidence, even in the presence of reasonable suspicion that Mitkovski could well have had other income, I cannot conclude that any period during the backpay period should be tolled because of his failure to disclose interim earnings. Compare: *McDonald Douglass Corp.* 270 NLRB No. 182, and *Flight Chief Co.*, 246 NLRB 407 with *American Navigation Co.*, 268 NLRB 426, 428 and *Great Plains Beef Co.*, 255 NLRB 1410.

MISCELLANEOUS DEFENSES

(a) Respondent also urges that to the extent that Miruzzi was paid monies as a supervisor during the 4-year backpay period, his earnings, as reflected in Schedule "B" of the amended backpay specification, should be lowered, thus lowering Respondent's gross and net backpay obligation to Mitkovski. As a matter of fact, however, the evidence failed to disclose that Miruzzi was, in fact, paid as a supervisor. Rather, the evidence showing that he was paid for "shop labor," "policy labor" or for "policy" matters merely demonstrated, on Mitkovski's uncontradicted and credited testimony, that the money flowing to Miruzzi was payment out of funds from sources other than customers, such as from insurance companies and from Respondent's own sources. Where, however, payment to Miruzzi was for work as "service manager" or similar designation, his earnings, and thus Mitkovski's project earnings should be reduced. The evidence shows no definite payment to Miruzzi as a supervisor. Rather, the evidence shows payment to Miruzzi to maintain his pay at the rate established for that period.

(b) Respondent also argues that during the backpay period, 50-percent of its business was in engine tune-ups. If a mechanic, like Mitkovski, was not certified in engine tune-ups, his earnings necessarily would be substantially diminished.

In fact, however, Respondent adduced only general testimony (proving that 50-percent of its business during the backpay period for mechanics was in engine tune-ups) from Demrovsky. This testimony was not supported by Respondent's books and records. It is not necessary to reject Demrovsky's unsupported testimony as incredible since Mitkovski, though not certified in "tune-ups," would have been fully able to acquire that trainee status as a

matter of simple application according to the testimony of Respondent's own witness, Fred J. Pirochta, of the Bureau of Automotive Regulation of the State of Michigan. Pirochta testified that a non-certified mechanic could perform such functions in the certification specialty merely by requesting and obtaining a "trainee permit" which was granted as a matter of routine. There is no proof that, as a matter of function, Mitkovski could not do "tune-ups". Indeed, Demrovsky testified that even though 50 percent of Respondent's work became "tune-ups," he would not have fired Mitkovski because he had no certificate in tune ups (Tr. 199-201).

Lastly, two further facts are noteworthy: (a) Respondent, prior to terminating Mitkovski, assigned him tune up work even without certification (Tr. 239); and (b) in view of Respondent's practice of equalizing work assignments (Tr. 236), there is no reason to believe that Mitkovski's backpay period income would have been reduced even if he were not assigned tune-up work in the backpay period.

Moreover, Mitkovski's lack of certification in "tune-up" must be measured against the Board finding, supported by the Court of Appeals, that immediately before Respondent embarked on it unfair labor practices against Mitkovski, his earnings and wage rate were higher than all other specialty mechanics (Gonterman, Tr. 262-263) and equal to or higher than that of Miruzzi's, at $11.20 per hour. The Board, again supported by the Court of Appeals, noted that, after Demrovsky learned that Mitkovski went to the NLRB, Demrovsky threatened Mitkovski that he would "not receive any desirable assignments"; and that Demrovsky considered Mitkovski to be at least a "good" mechanic. On the basis of these findings, I conclude that Respondent would have used its discretion, during the 4-year

backpay period, as it had prior to unlawfully dealing with Mitkovski, to see to it that Mitkovski's earnings did not fall below earnings to which he was accustomed prior to the discrimination against him, i.e., to be kept at a high level, as high as Miruzzi. Thus, during the backpay period, Respondent must be held to award Mitkovski sufficient work, even apart from "tune-ups," to keep him at a wage level consistent with his wage level prior to Respondent's discrimination against him as measured by Miruzzi's compensation (apart from any supervisory pay).

It should be noted, in this regard, that the pay rates of the specialty mechanics hired before and during the backpay period were appreciably below the rates and earnings of Mitkovski. None of them was favored by Respondent's characterization of Mitkovski as a "good" mechanic and none of them had pay rates or earnings at the rate of Mitkovski. These specialty mechanics (Nemirovsky, Pervine, Gardella, Wambough, and Becoskey, Respondent's amended answer, pp. 17-18; and see Gonterman, Tr. 262-263) also were not favored with receiving "desirable assignments" which Mitkovski historically received as noted by the Court of Appeals and the Board, and none of them was threatened by Respondent that they would "not get any jobs to make enough living so that [Mitkovski] would fire [himself]," as found by the Court of Appeals. Thus, as a matter of Mitkovski's historically high earning record, the explicit exercise of Respondent's pre-discrimination business discretion in the base period and its various subsequent threats and predictions, I conclude that Mitkovski would have had earnings higher than the intermediately hired specialty mechanics in the backpay period; and that specialty mechanics hired in the backpay period are not "similarly situated" employees or a "representative ground." Compare: *Berry-Mahurin Construction, Inc.*, 273 NLRB No. 133

(1984) with *Central Freight Lines, Inc.*, 266 NLRB 182 (1983). That proof of this reconstructed level of earnings rests on an evidentiary basis derived from Respondent's pre-discrimination conduct is not a bar to its utility. Respondent's unfair labor practices are at the root of the quality of proof requiring projection. It may not be heard to complain on the point since, in backpay cases, Respondent may not be allowed to benefit from the uncertainties caused by it own misconduct. *Berry-Mahurin Construction, Inc.*, 273 NLRB No. 133 (1984).

In sum, I conclude that Respondent has failed to support its burden of proving[10] that Mitkovski failed to make reasonably diligent efforts to seek interim employment; that he failed to disclose earnings from interim employment and that the pleaded gross backpay and net backpay assertions in the amended backpay specification, as amended at the hearing, were to be tolled by circumstances alleged by Respondent. Accordingly, I conclude that Mitkovski's earnings in the backpay period should be calculated by applying a base period ratio of 100 percent to Miruzzi's earnings in the backpay period ($ 108,270.19) against which must be deducted the net interim earnings ($ 14,621.46) and hereby issue the following recommended:[11]

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[10] **To the extent that Respondent asserts that the Compliance Officer specifically acted in bad faith or was negligent in investigating the extent of Mitkovski's interim earnings, such argument is rejected. The obligation to prove mitigation, in general, and undisclosed interim earnings, in particular, is on Respondent, not on the Compliance Officer. The evidence discloses neither bad faith nor negligence on the part of the Compliance Officer. While, as above noted, it is arguable that Mitkovski's testimony, that he met much of his expenses with "loans" and that his foreign trips were financed by "gifts" leaves one in doubt as to whether there were other interim earnings, such a record does not reflect on the Compliance Officer's honesty or capacity.**

[11] **In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Rela-**

(*concluded on page A-145*)

ORDER

Upon the basis of the foregoing findings and conclusions, it is hereby ordered that Respondent, Overseas Motors, Inc., it successors, officers, agents, and assigns, shall pay to Miroljub Mitkovski, the sum of $93,648.73 together with interest on that sum as provided in *Florida Steel Corp.*, 231 NLRB 615.[12]

Dated, Washington, D.C., July 3, 1985

/s/ Robert W. Leiner
Administrative Law Judge

ERRATUM

In the above-captioned Decision, issued 3 July 1985, page 15, line 47, (A-133) should be corrected to read, "4. *Tolling Because of Periods of Alleged Unavailability:*".

Dated, Washington D.C., 7 August 1985.

/s/ Robert W. Leiner
Administrative Law Judge

(*continued from page A-144*)

tions Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

12 See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

DECISION

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed November 23, 1983.)

(NATIONAL LABOR RELATIONS BOARD, Petitioner, v. OVERSEAS MOTOR, INC., Respondent — No. 82-1645; ON APPLICATION to Enforce and Petition to Review an Order of National Labor Relations Board.)

Before: KEITH and MARTIN, Circuit Judges, and SPIEGEL*, District Judge

KEITH, Circuit Judge.

This is an application by the petitioner, National Labor Relations Board (NLRB), seeking enforcement of its order that determined the respondent, Overseas Motor, Inc. (Overseas), had violated Section 8(a)(4) of the National Labor Relations Act by discriminating against one of its employees who had filed charges with the NLRB.

On September 12, 1980, Overseas Motors gave a raise to all of its employees. Miroljub Mitkovski, the highest paid mechanic employed by Overseas, received a sixty cents per hour raise while all other mechanics received a salary increase of $1.20 per hour. When asked for an explanation of his lesser wage increase, Sam Demrovsky, Mitkovski's supervisor and co-owner of Overseas, responded that he wanted to equalize the mechanics' pay. Demrovsky further responded that the matter was already decided and "that is the way it is whether you like it or not." Mitkovski then replied that he felt he was being discriminated against and that he intended to file a

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* **Hon. S. Arthur Spiegel, United States District Judge for the Southern District of Ohio, sitting by designation.**

complaint with the NLRB. Co-owner Andy Demrovsky responded, "you will be fired for that." Mitkovski replied that he did not see how he could be fired for filing a complaint. Andy or Sam Demrovsky responded, "Okay, you will not be fired but you won't get any jobs to make enough [of a] living, so you will fire yourself." Mitkovski sought and was granted approval to take time off to file charges.

After filing charges with the NLRB, several forms of disciplinary action were taken against Mitkovski. He was suspended for two days after returning to work from his visit to the NLRB to file charges. Mitkovski was later suspended for three days for tardiness after an agent from the NLRB called Sam Demrovsky to inform him that the Board had decided to issue a complaint on Mitkovski's charge. Mitkovski was finally discharged from employment when an agent from the NLRB visited Overseas and spoke to one of the Demrovskys about Mitkovski's charges.

The NLRB brought charges against Overseas Motors, Inc. which resulted in a hearing before an administrative law judge (ALJ). After the hearing, the ALJ found that Overseas had engaged in unfair labor practices by: (1) unlawfully threatening Mitkovski that he would not "get any jobs to make enough living so (he) would fire [himself]"; (2) unlawfully suspending Mitkovski for two days on September 15, 1980 and for three days on October 16, 1980; and (3) unlawfully discharging Mitkovski on October 23, 1980. The ALJ ordered, inter alia, that Overseas reinstate Mitkovski to his former position and make him whole for any loss of pay he may have suffered as a result of being unlawfully suspended and discharged.

This case was later appealed to the National Labor Relations Board (206 NLRB 105) who adopted the find-

ings, decision and order of the ALJ. Overseas later filed a motion for reconsideration which was denied by the Board.

The NLRB's order is supported by substantial evidence and does not constitute an abuse of discretion. Therefore, the order is entitled to enforcement by this Court.

Respondent, Overseas, contends that the ALJ's decision is not supported by substantial evidence. We find this contention is without merit. The ALJ found that the NLRB General Counsel established a prima facie 8(a)(4) violation by showing that: (1) Overseas threatened that if Mitkovski complained to the NLRB he would not receive any desirable assignments; (2) Overseas suspended Mitkovski on September 15, 1980 and October 6, 1980 because he had filed charges with the NLRB; (3) Mitkovski was considered a good auto mechanic; and (4) Mitkovski was discharged shortly after the Board visited Overseas, after which visit, Demrovsky, an Overseas co-owner, remarked to Mitkovski that it was "better" for him to "look for another job" and that he "might not quit, but [he] might be fired tonight." This evidence was sufficient to establish a prima facie 8(a)(4) violation. *See Wright Line, a Division of Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 445 U.S. 989 (1982).

Once the General Counsel establishes a prima facie 8(a)(4) violation by a preponderance of the evidence, the burden shifts to the employer to prove by a preponderance of the evidence that the employee would have been fired for permissible reasons even if he had not been involved in activity protected by the National Labor Relations Act (the Act). *See NLRB* v. *Transportation Management Corp.*, 103 S.Ct. 2469 (1983). In the present case, Overseas failed to present sufficient evidence to successfully rebut the evidence presented by the

General Counsel that the disciplinary action taken by Overseas against Mitkovski was done as a result of Mitkovski's filing charges with the NLRB.

The ALJ found that Overseas violated Section 8(a)(4) of the Act by threatening Mitkovski in Demrovsky's statement that he would not get enough jobs to make a living so he would, in effect, fire himself. Demrovsky, in an affidavit presented as evidence during the course of the hearing before the ALJ stated: "I recall that he was firing himself." The ALJ found this to be sufficient evidence to support a finding that this was a violation of Section 8(a)(4).

In support of its suspensions of Mitkovski, Overseas offered evidence that Mitkovski had violated its policies regarding punctuality. However, the ALJ found this evidence insufficient in light of an affidavit wherein Demrovsky explicitly stated that Mitkovski was suspended because he (Mitkovski) was going to file a complaint at the NLRB. Moreover, the ALJ permissibly found that the timing of these suspensions also lead to the conclusion that they were the result of Mitkovski's filing a complaint with the Board.

Finally, Overseas also presented insufficient evidence to support a finding that it did not violate 8(a)(4) of the Act by discharging Mitkovski from employment. It was alleged by Overseas that Mitkovski was discharged due to a poor driving record which jeopardized Overseas' insurance coverage. The NLRB's General Counsel, however, presented evidence which indicated that Overseas had long known of Mitkovski's poor driving record. In fact, there was evidence in the record which tended to show that Overseas had concealed Mitkovski's driving record from its insurance carrier. It was only after Mitkovski filed his charges with the NLRB that Overseas became "concerned" about his driving record. The ALJ

found that this concern by Overseas was a pretext for Mitkovski's discharge from employment.

This court's review of the NLRB decisions is limited. We have previously held that the NLRB's inference of unlawful motivation in dismissing an employee is entitled to affirmance if it is supported by substantial evidence. The reviewing court may not displace the NLRB's choice between two conflicting views — even where the court could justifiably have made a different choice had there been a *de novo* review of the same matter. *NLRB* v. *Retail Store Employees*, 570 F.2d 586, 590 (6th Cir. 1978).

For the reasons stated above, we find that substantial evidence on the record does support the Board's finding, and accordingly we uphold and enforce the Board's order.

DECISION AND ORDER

(Before the National Labor Relations Board)

(Dated March 11, 1982)

260 NLRB No. 105

(Overseas Motors, Inc. *and* Miroljub Mitkovski — Cases 7-CA-18251, 7-CA-18355, and 7-CA-18477)

BY MEMBERS FANNING, JENKINS AND ZIMMERMAN

On October 20, 1981, Administrative Law Judge Lowell Goerlich issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We also find totally without merit Respondent's allegations of bias and prejudice on the part of the Administrative Law Judge, nor do we perceive any evidence that the Administrative Law Judge prejudged the case, made prejudicial rulings, or demonstrated a bias against Respondent in his analysis or discussion of the evidence. We further find that Respondent was accorded a fair hearing in all respects.

conclusions[2] of the Administrative Law Judge and to adopt his recommended Order,[3] as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Overseas Motors, Inc., Livonia, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete the phrase "and expunge said suspensions from his personnel record" from paragraph 2(b).

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly:

> "(c) Expunge from its files any references to the suspensions of Miroljub Mitkovski on September 15 and October 6, 1980, and to his discharge on October 23, 1980, and notify him in writing that this has been done and that evidence of these unlawful actions will

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[2] Contrary to Respondent's contention, we find the Third Circuit's decision in *Hi-Craft Clothing Co.* v. *N.L.R.B.*, 660 F.2d 910 (1981), to be inapposite. In that case, unlike the instant case, the discriminatee was a supervisor within the meaning of the Act, and on that basis the court held that the Board had no authority to grant relief.

[3] The Administrative Law Judge inadvertently omitted from his recommended Order and notice a requirement that Respondent expunge from Mitkovski's personnel record any reference to his discharge, as well as to his suspensions. Accordingly, we have added such a requirement.

Member Jenkins would provide interest on the backpay award in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

not be used as a basis for future discipline against him."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER
OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT unlawfully interfere with our employees' rights under Section 8(a)(4) of the National Labor Relations Act, or unlawfully suspend or discharge our employees for filing charges with the National Labor Relations Board or for giving testimony under the National Labor Relations Act, as amended, in violation of Section 8(a)(4) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Miroljub Mitkovski, whom the Board found we unlawfully discharged because he filed charges with the National Labor Relations Board, immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, discharging, if necessary, any employee hired to replace him, and WE WILL make him whole, with interest, for any loss of pay he may have suffered because we unlawfully discharged him.

WE WILL additionally make Miroljub Mitkovski whole for any loss of pay he may have suffered

by reason of his suspensions on September 15 and October 6, 1980.

WE WILL expunge from our files any references to the suspensions of Miroljub Mitkovski on September 15, 1980 and October 6, 1980, and to his discharge on October 23, 1980, and WE WILL notify him that this has been done and that evidence of these unlawful actions will not be used as a basis for future discipline against him.

OVERSEAS MOTORS, INC.

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge: The charges filed by Miroljub Mitkovski in Cases 7-CA-18251, 7-CA-18355, and 7-CA-18477 on September 15, October 8, and November 5, 1980, were served on Overseas Motors, Inc., Respondent herein, by certified mail on September 17, October 10, and November 8, 1980, respectively. An order consolidating cases and second amended complaint and notice of hearing was issued on December 22, 1980. The original complaint was issued on October 8, 1980, and an amended complaint was issued on October 29, 1980. Complaints in the consolidated cases alleged that Respondent had violated Section 8(a)(1) and (4) of the National Labor Relations Act, as amended, herein referred to as the Act.

Respondent filed timely answers denying that it had engaged in or was engaging in the unfair labor practices alleged.

The consolidated cases came on for hearing in Detroit, Michigan, on July 22 and 23, 1981. Each party was afforded a full opportunity to be heard, to call,

examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

FINDINGS OF FACT, CONCLUSIONS, AND REASONS THEREFOR

I.

THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Michigan. At all times material herein, Respondent has maintained its office and place of business at 32400 Plymouth Road in the city of Livonia and State of Michigan, herein called the Livonia place of business. Respondent is engaged in the retail sale and servicing of automobiles. During the calendar year ending December 31, 1979, which period is representative of its operations during all times material hereto, Respondent, in the course and conduct of its business operations, had gross revenues in excess of $500,000 and purchased and received at its Livonia place of business products valued in excess of $50,000 directly from points located outside the State of Michigan.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II.

THE UNFAIR LABOR PRACTICES

First: On September 15, 1980, Respondent suspended Miroljub Mitkovski for 2 days "for arriving at 10:00 a.m. without valid explanation." (G.C. Exh. 4.) The incident

which gave rise to the suspension occurred on September 12, 1980. Mitkovski, who had worked as an auto mechanic for Respondent since the spring of 1976, was given a raise on September 12, 1980, as were other employees. However, Mitkovski was given a 60-cent-an-hour raise whereas the other mechanics received $1.60 an hour. Mitkovski complained to Samuel Demrovsky, "service manager and personnel hiring and firing grievance man" for Respondent. Mitkovski asserted that he was being "discriminated against" and said that he would go to the Secretary of State or the National Labor Relations Board,[1] whichever was responsible for handling the case, where he would file a complaint. Mitkovski continued in his testimony:

> His reply on that – as a matter of fact I have to take back – it was Mr. Demrovsky which is the third brother of Sam Demrovsky. He replied . . . "you will be fired if you do that." So my reply was "I would like to see that happen just for filing the charges that I can get fired." And either Mr. Sam Demrovsky or Andy Demrovsky stated to me, "Okay, you will not be fired but you won't get any jobs to make enough living so you will fire yourself."[2]

Mitkovski then asked approval to "take off" on Monday morning until 10 o'clock so that he could file charges. Demrovsky replied, "I don't care. Okay." However, Demrovsky instructed Mitkovski that he would be required to bring a "written receipt" of where he had

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[1] **Demrovsky admitted that Mitkovski said he was going to the Labor Board.**

[2] **Demrovsky's affidavit to the Board includes the statement: "I recall that he was firing himself."**

been. Also present during this conversation were Andy Demrovsky, John Demrovsky, and Helen Demrovsky.[3]

On the next Saturday, September 13, Mitkovski worked one-half day. Mitkovski inquired of Demrovsky whether he had reviewed the matter of raises and whether he would receive more money. Demrovsky answered that "everything would stay the same." Mitkovski reminded Demrovsky again that he would take time off Monday to file charges. Demrovsky replied, "Suit yourself."

On Monday morning, Mitkovski appeared for work at 10 a.m. Demrovsky asked for a "receipt." Mitkovski responded, "I do not have a receipt. The people I have contacted will contact you very soon; the people from the NLRB will contact you very soon."[4]

On Monday morning Mitkovski called the office of the Secretary of State which informed him that the Secretary of State did not handle Mitkovski's type of complaint. Mitkovski then phoned the National Labor Relations Board in Detroit, He talked to Ms. Sylvia "for about 45 minutes." Ms. Sylvia advised Mitkovski to come to the office at 1:15 p.m. to "talk with her some more, and to file the charges."

After the above conversation with Demrovsky, Mitkovski went to work on his job. At or around 10:45 Demrovsky approached Mitkovski and gave him the suspension above noted. When Mitkovski inquired as to

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3 As used herein Demrovsky will refer to Samuel Demrovsky unless otherwise noted.

4 Respondent had working rules which were committed to writing in June 1980 entitled, "Charter of Bylaws." Under the bylaws only absences of over 2 days were required to have a "valid explanation in writing." One of the benefits cited in the bylaws was: "Days off will be granted when asked with no pay." No employee had ever been asked to furnish a written "receipt" under circumstances similar to Mitkovski's case.

why he was given the suspension, Demrovsky said, "Well, you came in late and you didn't have no written receipt, no written receipt where you have been."

Demrovsky's affidavit to the Board reveals, "I decided to issue the suspension to Mitkovski on September 15, 1980, because he told me he was going to the Labor Board. I felt that by telling me this he was trying to test me to see what I would do. I felt it was necessary to crack down then."[5]

Second: On October 6, 1980, Mitkovski was again suspended, this time for 3 days. Citing punch-in times of 8:19, 8:46, and 10:59 for Friday (October 3), Saturday (October 4), and Monday (October 6), respectively, the suspension read, "No improvement in starting time therefore third warning must be issued, which is also the last one."[6] (G.C. Exh. 6.)

On October 6, 1980, Mitkovski arrived at work at or about 8:15 a.m. Mitkovski asked Demrovsky whether he could be excused until 10 o'clock since he had an appointment with his lawyer. Demrovsky answered, "If you don't have enough work you can go." Mitkovski returned around 10:15. Demrovsky called him to his desk and asked him where he had been. Mitkovski replied, "I went to see my lawyer." Demrovski entered in a book the date, "ten ten, went to see lawyer." Around 10:50 Demrovsky asked Mitkovski whether he had punched in. Mitkovski had forgotten and then punched in. He returned to his job. At 12:30 p.m. Demrovsky

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5 Of this statement Demrovsky testified, "It is the truth and it still exists. However, there should be a division made."

6 Mitkovski had been late on the average of two or three times a week during his entire tenure of employment. He had received one written disciplinary warning for tardiness on May 20, 1980. Mitkovski continued to be late after May 20 without written warning until September 15, 1980.

received a telephone call from Patrick Labadie from the Board's Detroit office. Demrovsky was informed that the National Labor Relations Board had decided to issue a complaint in respect to Mitkovski's charge.

Thereafter Demrovsky brought Mitkovski the suspension letter above mentioned. After Mitkovski read the suspension letter he reminded Demrovsky that he had asked for the time off and otherwise would not have left. Later in the day Mitkovski wanted to discuss the matter with Demrovsky. Demrovsky commented, "I am fed up of your threats and the only way I can listen what you talk is with the representative of the NLRB or the lawyer and I am not going to personally talk with you."

Third: On October 23, 1980, Mitkovski was discharged. On October 21, 1980, the investigator for the National Labor Relations Board visited Demrovsky. After the investigator left, Demrovsky went to the place where Mitkovski was working and said, "You know, Miro, I think it is better for you if you look for another job." Mitkovski asked why and said that he did not intend to quit. Demrovsky replied, "You might not but you might be fired tonight or tomorrow. We will see." On October 23, 1980, Mitkovski was called to the salesroom in the presence of Samuel and Andy Demrovsky. Thus Mitkovski describes what occurred:

> A. When I went there he explained to me that I had my first warning letter; that I had my second warning letter and I had my third warning letter, so he also blamed me that I falsified Mr. Terry Gonterman's timeclock from I believe it was October 4 on that Saturday when he punched along with me. We both punched at eight forty-six. I don't know why. Why should I falsify some timeclock to eight o'clock when it doesn't help my case? It just ruins it. . . .

> He claimed that I falsified that. He had already my check prepared and he also told me that he has got a letter from the insurance company that they are threatening that I would have put them on high risk policy because of me having suspended driving license. Then he said the company already had lost a suit and they were on a high risk policy at the moment when I was dismissed. . . .
>
> I tried to ask, first of all I tried to tell him that the first letter of May 20th is outdated because of by-laws of the company says it takes three letters. . . .[7]

Mitkovski asked for a letter of dismissal which was refused by Demrovsky.

The problem with insurance apparently arose because Mitkovski held a suspended driver's license.

The renewal date of Respondent's insurance policy with Citizens Insurance Company was November 9, 1980. Sometime prior to that time the insurance agency, Kapnick and Company, Inc., requested data on Respondent's employees who would be covered by the insurance. The purpose of this inquiry was to ascertain if any of Respondent's employees were high risks.

Demrovsky had known for over a year that Mitkovski's driver's license had been suspended.[8] On this point Demrovsky testified:

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[7] **On May 20, 1980, Mitkovski had received a warning letter in respect to his "8:45 arrivals." Mitkovski testified that he was told that this letter would not count toward dismissal since it was dated prior to the issuance of the written "Charter of Bylaws." Demrovsky denied Mitkovski's testimony.**

[8] **Mitkovski's driver's license had been suspended on October 7, 1979, and December 9, 1979, for failure to appear in court for "energy speed" violations. At the time of the hearing herein he had cleared up the violations and held a valid license.**

> Back to the driver's license situation. I knew he had driver's license suspended. I knew every bit of it and I had pushed him to get it reinstated. I was hiding in '79. Mr. Spain does not have a check on him because I purposely was trying to save Mr. Mitkovski's job by saying, look, you must have your driver's license because the insurance is going to cancel me. These were numerous warnings. Not only for the time but for the driving record and of course the misconduct with the customers. They were given not only to him but a couple other employees their records were bad but he had no driver's license."[9]

Demrovsky also testified, "I didn't want to fire that man [Mitkovski], so he doesn't lose his job. I was — well, I was doing everything in my power not to have him terminated."

In regard to the insurance company's request to furnish names of employees, Demrovsky testified:

> Now this letter is in September, the early part of September, *which is well before the National Labor Relations Board ever got into the act of filing these suits.*
>
> They had requested and were furnished names, addresses as stated, and, therefore, were not furnished immediately because *I was trying to see how I could go around, how I could go around by not revealing the record of our employees, especially Miro Mitkovski. I couldn't help it.*
>
> There was a second request letter that come in which we did not answer the first one. Voluntarily I didn't answer it. *I wanted to save the man's job.*

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9 **Spain was the insurance agent.**

> Therefore, we did answer the second one and they found out there is a license that is in suspension with a couple of warrants out for arrest in Westland and Livonia. [Emphasis supplied.]

After the "National Labor Relations Board . . . got into the Act" Demrovsky submitted the names and received a communication thereafter dated September 23, 1980, from Donald E. Spain, vice president in charge of sales of Kapnick and Company, Inc. Spain commented on the "bad" employees and asked "what we can do about the real bad ones." (G.C. Exh. 8.) Comments were made about three employees: Concerning Mitkovski: "FAC means he failed to appear in Court. Otherwise he ignores the law" and "Should not drive Co. cars"; Vulicevia: "should not drive company cars"; Schueltz: "This guy also ignores the law. Twice he failed to appear in court."

About the first or middle of October Spain conversed with Demrovsky. While Spain was not wholly clear as to the scope of the conversation he testified that he "indicated" to Demrovsky that "having an employee with an expired driver's license created a very serious problem for us, and to continue on with that kind of an employee driving a company vehicle would probably result in termination of insurance, at least with this carrier." According to Spain, Demrovsky asked him to "write this letter simply to validate with the employee that [his] statement to them is in fact true." On October 21, 1980, Spain addressed a letter to Demrovsky as requested, citing Mitkovski's failure to "meet the underwriting standards set by your insurance carrier." (G.C. Exh. 7.) Upon receipt of the letter Demrovsky immediately fired Mitkovski.

On November 3, 1980, Demrovsky advised Kapnick and Company, Inc., by letter, that Mitkovski had been discharged on October 23, 1980.

Demrovsky testified that prior to October 23, 1980, he had never mentioned to Mitkovski "the possibility of discharge." Mitkovski's driving record was never submitted to the insurance carrier to ascertain whether it would cover him (Spain represented the agency), nor did Respondent request that Mitkovski's name be submitted to the carrier for an opinion. At the time of Mitkovski's discharge Respondent's insurance was effective and would not have expired until November 9, 1980. Moreover, the insurance could not have been canceled except upon 10 days' notice. Mitkovski, prior to his discharge, was not given the opportunity to reinstate his driver's license.

In respect to unacceptable driving records Spain stated the policy thus:

> We simply explain to the clients that a person with a driving record that is unacceptable will not be able to drive company cars. If the job compels that they do then some action has to be taken. This is entirely up to the employer.

During the hearing Demrovsky cited several other reasons which were considered by Respondent in discharging Mitkovski. These reasons generally involved alleged misconduct which had been overlooked by Respondent prior to Mitkovski's contact with the Board and which had not been initially cited as reasons for discharge.[10]

In his affidavit Demrovsky described his discharge of Mitkovski as follows:

> I said we had a larger problem, that we could not get insurance on him to cover his driving to and

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10 **Demrovsky, at the hearing, asserted as additional reasons for discharge horseplay, use of the telephone, an expired mechanic's license, and "fondling of female customers." No written warnings were ever given for any of this alleged misconduct.**

> from work and his driving of company and customer's cars. I showed the letter from Donald Spain. He read the letter. He did not say anything. I told him he was discharged immediately. That he should pick up his toolbox and leave. He said so that's it huh? And I said, yes, that was it. Mitkovski then locked his toolbox and left. That was all that was said. I did not mention that Mitkovski had changed Terry Gonterman's timecard. [G.C. Exh. 11.]

Demrovsky's affidavit further reveals: "My policy is that I will keep an employee who has a bad driving record as long as he has a license that is in effect."

Demrovsky further testified that Mitkovski was a good auto mechanic.

Fourth: The General Counsel has established through credible evidence and by the admission of Demrovsky ("I decided to issue the suspension to Mitkovski on September 15, 1980, because he told me he was going to the Labor Board") that Mitkovski was suspended on September 15, 1980, because he expressed the intention of complaining to the National Labor Relations Board. The suspension of Mitkovski "because he made known a decision to seek Board assistance" interfered with the rights guaranteed under Section 8(a)(4) of the Act and was in violation of Section 8(a)(4) of the Act. *Hoover Design Corporation*, 167 NLRB 461, 462 (1967); *Mitsubishi Aircraft International, Inc.*, 212 NLRB 856, 866 (1974). Moreover, for the same reason Respondent violated Section 8(a)(4) when it threatened Mitkovski that he would not "get any jobs to make enough living so [he] would fire [himself]" if he filed a complaint with the Board and when Respondent required Mitkovski to present a receipt of his contact with the Board's offices. These actions of Respondent placed an unlawful restraint on

Mitkovski whereas the Act demands that there be free access to its protection. To hold otherwise would afford the employer a means by which it could frustrate the Act and render Section 8(a)(4), as here, ineffective under certain circumstances. This the Act forbids. Additionally, the General Counsel has established that Mitkovski was suspended again on October 6, 1980, almost immediately after Respondent had been notified that the Board was issuing a complaint on Mitkovski's charge even though a cause for the suspension had been tardiness for which Mitkovski had been excused. (Mitkovski had been excused to see his lawyer.) It is obvious that Respondent was prompted by Mitkovski's charge filed with the Board when it suspended him. Thereby Respondent violated Section 8(a)(4) of the Act.[11]

In respect to Mitkovski's discharge, the General Counsel's *prima facie* case disclosed that (1) Respondent threatened that if Mitkovski complained to the Labor Board he would not receive any desirable working assignments; (2) Respondent suspended Mitkovski on September 15 and October 6, 1980, because he had filed charges with the Board; (3) Mitkovski was considered a good auto mechanic; and (4) Mitkovski was discharged shortly after the investigator from the Board visited Respondent, after which

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[11] The General Counsel has cited *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975), to support the claim that Mitkovski was engaged in concerted activities and thus Respondent's misconduct violated Sec. 8(a)(1) of the Act. This case is not apposite. *Alleluia Cushion Co., Inc.*, involved alleged violations of occupational safety which, although raised by an individual only, were found by the Board to encompass the well-being of fellow employees. Unlike the discriminatee in the *Alleluia Cushion* case Mitkovski's complaint was wholly personal. It involved the denial of a wage increase which concerned Mitkovski only. The complaint did not encompass the working conditions of any other employees. Hence there was no concerted activity and no violation of Sec. 8(a)(1) of the Act.

Respondent remarked to Mitkovski that it was "better" for him to "look for another job" and that he "might not but [he] might be fired tonight." Thus a *prima facie* case has been established that Mitkovski was discharged because he filed charges with the Board. Cf. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1981).

Respondent seeks to rebut the *prima facie* case by offering evidence that Mitkovski was discharged, since to have continued him on its payroll would have caused its insurance carrier to have refused to renew its insurance, because Mitkovski's driver's license was suspended. That this reason was pretextual is borne out by these facts: Prior to Mitkovski's filing charges with the Board, Respondent knew of Mitkovski's driving record and concealed it from the insurance company in order to retain Mitkovski on its payroll. In fact Respondent did not respond to the insurance agency's first request for its employees' names in order that the agency could check them for driver risk so that those employees who were potential risks, including Mitkovski, could be protected on its payroll. It was only after the Board matter surfaced that Respondent abandoned its concealment and furnished the insurance agency the information it sought. Although the insurance carrier had not evaluated Mitkovski as a risk, Respondent discharged him nevertheless.

Finally, at the time of Mitkovski's discharge Respondent's insurance was in effect and would not have expired until November 9, 1980. Thus, there was no need for Respondent's precipitous discharge action. In this respect this case is not unlike the case of *Golden Beverage of San Antonio, Inc.*, 256 NLRB 469 (1981), in which the Board found wrongful discharges when the "Respondent has failed to advance a cogent explanation

indicating a non-discriminating motive for the discharges of these three employees, which occurred prior to their actual exclusion from insurance coverage." The respondent had discharged them because its insurance carrier had indicated that it would exclude them from coverage. As in the *Golden Beverage* case Respondent in the instant case had "used alleged problems involving insurance coverage to mask its real reasons." Clearly Respondent discharged Mitkovski in retaliation for his protected activity of contacting the National Labor Relations Board and filing a charge with it; Respondent thereby violated Section 8(a)(4) of the Act.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the policies of the Act for jurisdiction to be exercised herein.

2. By unlawfully threatening Miroljub Mitkovski that he would not "get any jobs to make enough living so [he] would fire [himself]" if he filed a complaint with the National Labor Relations Board, and by requiring Mitkovski to present a receipt of his contact with the National Labor Relations Board, Respondent violated Section 8(a)(4) of the Act.

3. By unlawfully suspending Mitkovski for 2 days on September 15, 1980, and for 3 days on October 6, 1980, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(4) of the Act.

4. By unlawfully discharging Mitkovski on October 23, 1980, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(4) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It having been found that Respondent unlawfully discharged Miroljub Mitkovski on October 23, 1980, in violation of Section 8(a)(4) of the Act, it is recommended, in accordance with Board policy, that Respondent offer said employee immediate and full reinstatement to his former position or, if such position no longer exists, to substantially equivalent employment, without prejudice to his seniority or other rights and privileges previously enjoyed, dismissing, if necessary, any employee hired on or since October 23, 1980, to fill any of said positions,[12] and make him whole for any loss of earnings he may have suffered by reason of Respondent's acts herein detailed by payment to him of a sum of money equal to the amount he would have earned from the date of his unlawful discharge to the date of an offer of reinstatement, less net earning during such period, with interest thereon, to be computed on a quarterly basis in the amount and manner established by the Board in *F.W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[13]

It is further recommended that Miroljub Mitkovski be reimbursed for any loss of pay by reason of his unlawful suspensions, with interest, in accordance with the Board's usual policy, and that his suspensions be expunged from his personnel record.

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12 **Respondent is not precluded, in subsequent compliance proceedings, from contending that, after a good-faith exploration of Mitkovski's insurability, he is actually uninsurable with any carrier, and that its backpay liability should be commensurably reduced. See *Golden Beverage of San Antonio, Inc.*, *supra*. See also *Viele & Sons, Inc.*, 227 NLRB 1940, 1950, 1951 (1977).**

13 **See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).**

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[14]

The Respondent, Overseas Motors, Inc., Livonia, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interfering with employees' 8(a)(4) rights.

(b) Unlawfully suspending or discharging employees for filing charges with the National Labor Relations Board or for giving testimony under the National Labor Relations Act, as amended, in violation of Section 8(a)(4) of the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer Miroljub Mitkovski immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, discharging, if necessary, any employee hired to replace him, and make him whole for any loss of pay he may have suffered by

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14 **In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.**

reason of Respondent's unlawful discharge of him in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(b) Make whole Miroljub Mitkovski, with interest, for any loss of pay he may have suffered by reason of his unlawful suspensions on September 15 and October 6, 1980, and expunge said suspensions from his personnel record.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Livonia, Michigan, establishment copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act other than those found in this Decision.

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[15] **In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."**

ORDER DENYING PETITION FOR REHEARING *EN BANC*

(United States Court of Appeals — Sixth Circuit)

(Filed March 12, 1992)

(MIROLJUB MITKOVSKI, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent — No. 91-5159)

BEFORE: RYAN and SUHRHEINRICH, Circuit Judges; and PECK, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

29 U.S.C. § 160(c)

Reduction of Testimony to Writing: Findings and Orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act [subchapter]: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its find-

ings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

29 U.S.C. § 160(e)

Petition to Court for Enforcement of Order; Proceedings; Review of Judgment

The Board shall have the power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for a leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be

taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

29 U.S.C. § 160(f)

Review of Final Order of Board on Petition to Court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Supreme Court, U.S.
FILED
MAY 26 1992
OF THE CLERK

No. 91-1704

In The

Supreme Court of the United States

October Term, 1991

OVERSEAS MOTORS, INC.,

Petitioner,

v.

MIROLJUB MITKOVSKI and
NATIONAL LABOR RELATIONS BOARD,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT MIROLJUB MITKOVSKI'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision when it determined that an employer that had discharged an employee in violation of the National Labor Relations Act did not meet its burden of demonstrating that the former employee had intentionally concealed income he received during the backpay period.

STATEMENT OF THE CASE

Petitioner's statement of the case is slanted. This Court should rely on the Sixth Circuit's statement of facts. (A 2-6)[1] It has the virtue of neutrality.

Petitioner is also selective. Petitioner fails to mention certain pieces of "this voluminous litigation[.]" (A 2) Petitioner reinstated Mitkovski in July 1984 only after the Sixth Circuit had issued an order to show cause why it should not be held in contempt. (A 111-112) Petitioner also fails to mention that in December 1988 it filed a complaint for injunctive relief in the United States District Court for the Eastern District of Michigan seeking a stay of all proceedings before the National Labor Relations Board ("Board") and an order determining that it was not obligated to Mitkovski for backpay. (Civil Action No. 88-75112) The district court granted the Board's motion to dismiss for lack of subject matter jurisdiction. (A 28) Petitioner's contempt and its frivolous lawsuit should provide this Court with a clue as to its motivation in filing this petition.

Petitioner also mischaracterizes the Board decision that the Sixth Circuit reversed. The Board majority (the decision was two/one) was not deciding this case based on its precedent. Nor was it establishing new precedent. Rather, the Board began and ended its analysis by stating that it was attempting to interpret the Sixth Circuit's remand:

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[1] The appendix is abbreviated "A" followed by the page number(s). Petitioner's brief is abbreviated "B" followed by the page number(s).

> We start from the proposition that we are deciding this case within the scope of a limited remand from the court of appeals and the findings and conclusions of the court must be treated as the law of the case.
>
> . . .
>
> In these circumstances, we are constrained by the court's remand to deny backpay in this case.

(A 16, 18, n. 13)

SUMMARY OF ARGUMENT

It is at best disingenuous and at worst dishonest for petitioner to claim that the Sixth Circuit took from the Board its authority to protect the integrity of its processes. The Sixth Circuit remanded this case to the Board with certain instructions. The Board attempted to follow them. The Sixth Circuit concluded that the Board majority had failed to do so.

ARGUMENT

THE COURT OF APPEALS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION WHEN IT DETERMINED THAT AN EMPLOYER THAT HAD DISCHARGED AN EMPLOYEE IN VIOLATION OF THE NATIONAL LABOR RELATIONS ACT HAD NOT MET ITS BURDEN OF DEMONSTRATING THAT THE FORMER EMPLOYEE HAD INTENTIONALLY CONCEALED INCOME HE RECEIVED DURING THE BACKPAY PERIOD.

This is a case in which the liability issues have been resolved. The remaining issue is remedial. After the Board ordered that Overseas pay Mitkovski the backpay

due him, the Sixth Circuit remanded to the Board with instructions based on its finding that the administrative law judge ("ALJ") had impermissibly restricted petitioner's cross examination of Mitkovski regarding his interim earnings. The ALJ then conducted two further hearings. The ALJ made findings of fact which are not in dispute. The ALJ concluded that petitioner had not met its burden of demonstrating that Mitkovski had intentionally concealed income he received during the backpay period. The Board, construing the Sixth Circuit's instructions differently than the ALJ, reversed. The Sixth Circuit found that the ALJ's analysis was correct.

Given the unexceptional nature of this decision, petitioner is forced to misconstrue it in constructing an argument why this case merits review. The premise on which petitioner's argument is based is:

> In this case, the Board determined that the appropriate remedy for Mr. Mitkovski's unlawful discharge included reinstatement without backpay – an option expressly provided for in § 10(c) – as well as a cease-and-desist order against the Company and a notice-posting requirement. *Overseas Motors, Inc.*, 260 NLRB 810, 815 (March 11, 1982). Accordingly, the Board declined to adopt the administrative law judge's recommendation that Mr. Mitkovski receive backpay.

(B 10)[2]

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[2] Petitioner appears to be arguing that the Board in its 1982 decision determined that the appropriate remedy was reinstatement without backpay. That decision is to the contrary – the Board adopted an ALJ decision which included a backpay remedy. (A 151-170)

Petitioner is trying to say that when the Board in 1989 interpreted the terms of the Sixth Circuit's remand as requiring that it not order backpay it was making a policy decision that backpay was not an appropriate remedy. In other words, petitioner's brief reads as if the Board had said: "Based on the facts as developed at the hearings subsequent to the remand, we decide pursuant to our broad discretion in fashioning appropriate remedial orders that the backpay remedy is not appropriate here." Petitioner's problem is that that was not what the Board said. It said it was attempting to interpret the Sixth Circuit remand.

In addition to basing its argument on a false premise, petitioner dresses it up by implying that the Sixth Circuit decision is inconsistent with established Board precedent (B 8) and with a ruling of this Court (B 12-14). Neither implication is warranted.

First, petitioner implies that the Board was claiming that its ruling was consistent with established Board precedent. (B 8) Petitioner relies on a footnote in the Board opinion stating that "to the extent there is evidence from which it can be inferred" that the claimant had received substantial sum of money and that money could not be attributed to any particular quarter, then it would be appropriate to deny all backpay. (A 18, n. 12) That is the very inference that the Sixth Circuit held that the Board had no business making. If one needs any further evidence that these cited Board cases do not support what the Board did in this case, one need only look to the Board's words in the first case cited by petitioner:

> It must be emphasized, however, that these cases would not license a judge – or the Board – to deny all backpay to a discriminatee simply because he lied about a particular matter or

> even was generally unworthy of belief. Such a reading of those cases would effectively negate the rule of *American Navigation,* and would not accord with rational standards of adjudication.

Ad Art Inc., 280 NLRB 985, 989 (1986).

Finally, petitioner argues that the Sixth Circuit decision is inconsistent with this Court's ruling in *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951). It is not. The Sixth Circuit correctly cited *Universal Camera* for the propositions that: 1) an ALJ's decision is entitled to substantial weight and must be considered when evaluating an NLRB decision and order; and 2) evidence supporting an NLRB order can be treated as less substantial when an ALJ who has observed the witnesses has drawn conclusions different from the Board's. Petitioner incorrectly claims that the Sixth Circuit relied on *Universal Camera.* It relied on the Board having misconstrued its remand instructions.

CONCLUSION

This is a garden variety, fact specific case in which the Sixth Circuit determined that the National Labor Relations Board had failed to properly follow its remand instructions. There is no reason for this Court to grant this petition.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

OVERSEAS MOTORS, INC., PETITIONER

v.

MIROLJUB MITKOVSKI AND
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that an unlawfully discharged employee was not entitled to an award of backpay because he intentionally concealed earnings he received from interim employment during the backpay period.

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OPINIONS BELOW

The opinion of the court of appeals reviewing the Board's second supplemental decision and order (Pet. App. A1-A10) is unreported. Its opinion remanding the case to the National Labor Relations Board (Board) (Pet App. A98-A106) and its opinion in the underlying unfair labor practice proceeding (Pet. App. A146-A150) are reported at 818 F.2d 517 and 721 F.2d 570, respectively. The Board's second supplemental

decision and order (Pet. App. A11-A24), including the decisions of the administrative law judge (ALJ) (Pet. App. A25-A58, A59-A97), is reported at 299 N.L.R.B. No. 158. The Board's first supplemental decision and order (Pet. App. A107-A108) is reported at 277 N.L.R.B. 552, and its decision and order in the underlying unfair labor practice proceeding (Pet. App. A151-A154) is reported at 260 N.L.R.B. 810.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1992. A petition for rehearing was denied on March 12, 1992. Pet. App. A171. The petition for a writ of certiorari was filed on April 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 11, 1982, the Board found that petitioner had unlawfully discharged mechanic Miroljub Mitkovski on October 23, 1980, in violation of Section 8(a)(4) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(4) and (1), because Mitkovski had contacted the Board and filed an unfair labor practice charge against petitioner. The Board ordered petitioner, *inter alia*, to offer Mitkovski full reinstatement and to make him whole for any loss of pay he may have suffered by reason of petitioner's discrimination against him. Pet. App. A151-A152, A167, A169-A170. On November 23, 1983, the court of appeals enforced the Board's order in its entirety. *Id.* at A150.

Petitioner refused to reinstate Mitkovski. The Board therefore filed a civil contempt action in the court of appeals to compel petitioner to reinstate him. Following the court's issuance of an order to show cause, petitioner agreed to reinstate Mitkovski on

July 11, 1984. Upon the Board's motion, the contempt proceeding was dismissed without prejudice. Pet. App. A99.

2. The parties were unable to agree upon the amount of backpay due Mitkovski. The Board's Regional Office therefore began a backpay proceeding pursuant to the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. 102.52 *et seq.* After a hearing, the ALJ recommended that Mitkovski be awarded backpay of $93,648.73, plus interest. That sum represented the difference between the approximately $108,000 Mitkovski would have earned during the four-year backpay period, had he not been discharged, and his approximately $14,000 in interim employment earnings. On November 19, 1985, the Board adopted the ALJ's recommendation. Pet. App. A107, A144-A145.

The court of appeals remanded the case to the Board for an additional hearing, finding that the ALJ had "impermissibly restricted Overseas' cross-examination of Mitkovski regarding his interim earnings, thereby depriving Overseas of a fair hearing." Pet. App. A98. The court pointed to the large discrepancy between Mitkovski's interim earnings and unemployment compensation of about $18,000 and the $96,000 in expenses that Mitkovski admitted during the four-year period. *Id.* at A103.[1] Noting that Mitkovski claimed loans of $70,000 to account for the discrepancy between his income and his expenditures, the court concluded that petitioner was erroneously prohibited from questioning Mitkovski about these loans, about other income, and about certain expenditures,

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[1] The court noted that Mitkovski "testified that he spend [*sic*] about $2,000 a month, which would amount to $96,000 for the four-year period." Pet. App. A103.

including the cost of overseas trips taken by Mitkovski and his family. *Id.* at A104. The court further noted that Mitkovski's failure to keep records of his interim earnings and the fact that none of the income from his auto repair work or from his borrowing was reflected in any bank account records were "suspicious circumstances" warranting further scrutiny. *Ibid.* Finally, the court concluded that the fact that Mitkovski's interim earnings amounted to only 13.52% of the earnings of a representative employee during the same period required Mitkovski to show "special circumstances" that might "explain what might otherwise appear incredible." *Id.* at A105.

3. a. In his initial decision after the remand, the ALJ found that, although there was a discrepancy between Mitkovski's income and expenditures, it was insufficient to meet petitioner's burden of establishing that Mitkovski had failed to disclose additional interim earnings. He therefore reaffirmed his prior order awarding Mitkovski full backpay of $93,648.73. Pet. App. A91.

The ALJ found, based on the evidence adduced at the remand, that Mitkovski obtained various loans totalling $60,000 and that he had additional income of $18,682 derived from part-time work, self-employment, and unemployment compensation, for a total of $78,000 in gross receipts over the backpay period. Pet. App. A83, A91. The ALJ additionally found that Mitkovski's expenses were closer to $90,000 than the $96,000 cited by the court because he had diminished living expenses during lengthy trips to Yugoslavia, which decreased the $2,000 monthly expenses noted by the court of appeals. *Id.* at A83. Finally, the ALJ found that petitioner failed to prove that Mitkovski did not make reasonable efforts to find interim employment,

and had failed to call as witnesses the persons whom Mitkovski allegedly contacted in his unsuccessful efforts to obtain further interim employment. *Id.* at A84-A94. In this respect, the ALJ noted that Mitkovski had been "blackballed" by several employers offering comparable employment. *Id.* at A88, A92.

While the ALJ's decision was pending Board review, the Board, at petitioner's request, remanded the case to the ALJ for further hearings on petitioner's allegations that Mitkovski had committed perjury during the remand hearing. Pet. App. A11 n.1.

b. Based on evidence obtained in the reopened hearing, the ALJ modified his previous findings concerning Mitkovski's financial circumstances during the backpay period. The ALJ found that, of 11 promissory notes totalling $67,850, which Mitkovski had allegedly given to lenders, two of the notes (totalling $2,000) were fictitious, and one (with a face value of $5,000) was inflated by $1,400.[2] In addition, the ALJ found

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[2] Specifically, the ALJ found that Mitkovski had lied in testifying that his neighbor, Tim Keyes, loaned him $2,000. The ALJ concluded that, while Keyes had executed two notes in that amount, he had never transferred any money to Mitkovski; instead, Mitkovski told Keyes that he needed the notes to establish the source of his interim income, and that a Board agent would visit him to discuss the loans. Pet. App. A15, A34-A35, A39-A40. The ALJ further found, as to a third note, that although Mitkovski had drafted one stating that he had borrowed $5,000 from Robert Wagner, Wagner had actually loaned him only $3,600. The ALJ also found that Mitkovski lied in denying that he told Wagner that he needed the inflated note in order to show that he was using borrowed money on which to live, and that someone from the Board would be coming to speak to Wagner about the loan. *Id.* at A15, A35-A37, A41-A42.

that Mitkovski had attempted to suborn perjury with regard to a $7,500 loan that he had repaid.[3] Subtracting the $3,400 in inflated loans, the ALJ adjusted his prior calculations to show that during the backpay period Mitkovski's income from loans, interim employment, and unemployment compensation totalled $82,500. He further found that Mitkovski's expenses during this period ranged between $86,400 and $91,200.[4] The resulting shortfall was between $4,000 and $9,000. Pet. App. A16, A44, A47. The ALJ concluded that this shortfall between income and expenses, standing alone, "fails to support an inference of intentionally concealed interim earnings or that Mitkovski failed to make a reasonable effort to seek interim employment." *Id.* at A47.

The ALJ rejected petitioner's argument that Mitkovski's untruthfulness concerning the loans "undermine[d]" his previous testimony that he had sought interim employment during the backpay period. Pet. App. A48. The ALJ pointed out that Mitkovski had provided the names of the places he had sought work, that he had been blackballed by at least three of the five places where he sought work, and that petitioner had "explicitly refrain[ed] from questioning Mitkovski" with regard to his efforts to

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[3] The ALJ found that Mitkovski contacted Dale Flohr prior to the 1987 remand hearing and asked him to tell anyone who might question him that a $7,500 loan made in 1983 had not been repaid when, in fact, it had been repaid in about 1985 or 1986. Pet. App. A15-A16, A37-A38, A43.

[4] Although the court of appeals in its remand decision had stated that Mitkovski's living expenses were $2,000 a month (see note 1, *supra*), the ALJ noted that Mitkovski had actually testified that his expenses were "close to" $2,000. The ALJ thus fixed Mitkovski's expenses at either $1,800 or $1,900 per month. Pet. App. A45.

obtain work during the last two years of the backpay period. *Id.* at A49-A50.[5] The ALJ added that, while Mitkovski's lies reflected adversely on his credibility, they did not suggest that he "enjoyed any unreported earnings in the backpay period." *Id.* at A53. Rather, they suggested that Mitkovski was trying to exaggerate his expenses in order to obtain a larger backpay award from the Board in the mistaken belief that the size of his backpay award would be tied to the amount of his expenses during the backpay period. *Id.* at A53-A54. The ALJ concluded that, although the evidence adduced shows that Mitkovski was "a liar, a finagler and a suborner of perjury on immaterial elements," his "lies and subornation * * * do not support an inference that he had unreported earnings in the backpay period." *Id.* at A56-A57.

The ALJ also observed (Pet. App. A54-A55) that, while the Board will deny backpay to a discriminatee who intentionally conceals interim employment, such denial is limited to the calendar quarters in which the concealment occurs unless the employee's dishonesty makes it impossible to calculate an accurate figure for any particular quarter. *Ibid.*, citing *American Navigation Co.*, 268 N.L.R.B. 426 (1983); *Ad Art Inc.*, 280 N.L.R.B. 985 (1986). The ALJ found that principle not relevant here because "the evidence adduced both in the 1987 remanded hearing and in this 1989 reopened hearing does not show or even suggest that Mitkovski had unreported earnings in the backpay period." Pet. App. A55-A56. Accordingly, the

[5] The ALJ also noted that Mitkovski was hindered in obtaining work during some of the backpay period because he had left his tools as security for one of the loans he had obtained. Pet. App. A51.

ALJ reaffirmed his earlier order that Mitkovski be awarded backpay inthe amount of $93,648.73, plus interest. *Id.* at A57-A58.

c. The Board disagreed with the ALJ and found that Mitkovski was not entitled to any backpay. Pet. App. A18.[6] The Board stated that it construed the court of appeals' remand as shifting the burden to the General Counsel and Mitkovski to show "special circumstances" why the shortfall between Mitkovski's income and expenditures did not preclude an award of backpay. *Id.* at A18 n.13. The Board also construed the remand as precluding the reassessment of Mitkovski's expenses made by the ALJ. *Id.* at A16-A17. Accordingly, the Board found that Mitkovski had a $13,500 discrepancy between his $96,000 in expenses and $82,500 in receipts during the backpay period that could not be attributed to "anything other than income from some source or sources that Mitkovski has not reported," *id.* at A17-A18, and could not be allocated to a particular segment of the backpay period. *Id.* at A18 & n.12. In those circumstances, and "particularly in light of Mitkovski's perjury and his attempt to suborn perjury of another witness," *id.* at A18, the Board was "constrained by the court's remand to deny backpay in this case." *Id.* at A18 n.13.

4. The court of appeals, in an unpublished *per curiam* opinion, found that "the facts do not permit the Board's inference that Mitkovski intentionally concealed interim earnings." Pet. App. A2. The court stated that the issue was whether petitioner "met its burden of demonstrating that Mitkovski intentionally

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[6] Member Cracraft dissented, Pet. App. A19-A24, agreeing with the ALJ that the inference that Mitkovski concealed interim earnings was not warranted.

concealed income he received during the back pay period." *Ibid.* It concluded that substantial evidence did not support the Board's finding that the shortfall between Mitkovski's income and expenses must be attributable to unreported income. *Id.* at A9-A10. Rather, the court agreed with the ALJ that Mitkovski had adequately explained his inability to find interim employment, [7] and that petitioner had "failed to prove that Mitkovski supported himself and his family through earnings that he intentionally concealed." *Id.* at A9. Accordingly, the court remanded the case to the Board with instructions to provide backpay consistent with the ALJ's decision. *Id.* at A10.

ARGUMENT

Petitioner contends (Pet. 8) that review is warranted in this case because the court of appeals improperly interfered with the Board's processes by precluding the Board from denying backpay "to a discriminatee who committed perjury and who suborned perjury." Petitioner misstates the basis of the Board's decision, and the factbound disagreement between the Board and the court of appeals does not warrant this Court's review.

1. Contrary to petitioner's suggestion, the Board did not deny Mitkovski backpay simply because he had committed perjury. Rather, the Board interpreted the

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[7] The court stated that, while Mitkovski's interim earnings "amounted to roughly fifteen percent of the back pay award," the ALJ noted that "blackballing at several local auto dealerships made it difficult for Mitkovski to obtain employment" and that "Mitkovski could not have worked as a private mechanic to earn additional income during much of the back pay period because he left his tools as collateral for one of his loans." Pet. App. A9.

court of appeals' prior remand order as placing the burden on Mitkovski to explain the discrepancy of $13,500 between his income and expenses during the backpay period. It then concluded, "particularly in light of Mitkovski's perjury and his attempt to suborn perjury of another witness," Pet. App. A18, that he had not sustained that burden. The Board further concluded that it was "not credible" that the unexplained discrepancy of $13,500 "could be anything other than income from some source or sources that Mitkovski has not reported," and that, since the Board could not determine in which "backpay quarter or quarters [the unreported] money was received," it would "deny Mitkovski all backpay." *Id.* at A17-A18.[8]

In reversing the Board's denial of a backpay award, the court of appeals did not disagree with the remedial principles developed by the Board when confronting

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[8] The Board thus applied principles it articulated in *American Navigation Co.*, 268 N.L.R.B. 426, 428 (1983), and developed in later cases. See Pet. App. A18 n.12. In *American Navigation*, the Board stated that, in fashioning a remedy in cases where a discriminatee has intentionally concealed earnings from the Board, it must consider the public interest in assuring the integrity of its processes as well as the interest in remedying unfair labor practices. Guided by that principle, the Board distinguished the situation in which a discriminatee in compliance proceedings concealed interim earnings for certain quarters from that in which the concealment cut across all backpay quarters. In the former situation, the Board stated that a remedy that denied backpay only for the quarters in which concealed earnings occurred would effectuate the policies of the Act, whereas in the latter situation the discriminatee would be denied all backpay. See also *Ad Art, Inc.*, 280 N.L.R.B. 985, 987-989 (1986) (concurring opinion of Member Stephens); *Owens-Illinois,. Inc.*, 290 N.L.R.B. 1193, 1194, enforced, 872 F.2d 413 (3d Cir. 1989) (Table).

instances of perjury (see note 8, *supra*). Rather, the court disagreed with the Board's conclusion that the only inference to be drawn from the record was that Mitkovski had concealed interim earnings. The court, in agreement with the ALJ, found that Mitkovski's perjury in attempting to inflate the value of loans did not impeach the credibility of his testimony respecting his efforts to obtain additional interim employment.[9] The court further found that evidence showing that Mitkovski had been blackballed and had left his tools as collateral for one of his loans explained why he is entitled to a backpay award which is large relative to his interim earnings. The court thus concluded that the burden was on petitioner to show that Mitkovski had concealed earnings, and that petitioner failed to carry that burden.

2. The Board believes that its inference that Mitkovski had concealed earnings was reasonable and should not have been displaced by the court of appeals. The difference between the Board and the court of appeals, however, does not turn on a dispute over legal principles, but presents an evidentiary issue that is tied to the particular facts of this case. Such an issue of substantial evidence does not warrant this Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

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[9] Similarly, Member Cracraft dissented from the Board's ruling because she also agreed with the ALJ's finding that Mitkovski did not conceal interim earnings and disagreed with the contrary inference drawn by the Board. Pet. App. A19-A24.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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PETITIONER'S REPLY TO RESPONDENT MIROLJUB MITKOVSKI'S BRIEF IN OPPOSITION AND TO THE BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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PETITIONER'S REPLY
TO RESPONDENT MIROLJUB MITKOVSKI'S BRIEF IN OPPOSITION AND TO THE BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

Respondents Miroljub Mitkovski and the National Labor Relations Board (the "Board") have filed briefs in opposition to Petitioner Overseas Motors, Inc.'s ("Overseas Motors") Petition for a Writ of Certiorari on different and confusing grounds that mistake the important policy questions involved in this case and leave one wondering how it can be argued that anyone, such as Mr. Mitkovski, who has deliberately committed *perjury* before an instrumentality of the Federal government should be awarded full backpay in the amount of $93,648.73 for his actions. Equally incredible is the Board's complete lack of interest in safeguarding the integrity of its own processes as manifested not only by its characterization of this matter as a simple fact dispute, but by its own participation in Mr. Mitkovski's subornation of perjury. As unbelievable as it may seem,

Counsel for the General Counsel, representing the Board during the backpay proceedings, had in its possession and failed to disclose conclusive evidence in the form of affidavit testimony that Mr. Mitkovski perjured himself at the initial backpay hearing, and planned to and did perjure himself at the second backpay hearing as well, and that all or certain of the loans which Mr. Mitkovski claimed to use for his living expenses during the backpay period were not valid, but that they were a sham contrived by Mr. Mitkovski and intended to defraud Overseas Motors. Faced with the adjudication of a matter by a process so tainted with perjury and impropriety, it is easy to understand why Overseas Motors sought relief in Federal district court, notwithstanding Mr. Mitkovski's mean and unjustified characterization of this desperate effort by Overseas Motors to secure justice as "frivolous."

In Section 10(c) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 160(c), Congress empowered and directed the Board, upon finding that an unfair labor practice has been committed, to issue:

> ". . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without backpay, as will effectuate the policies of this Act. . . ."

Congress naturally expected the Board to undertake the responsibility delegated to it and affirmatively uphold and further the policies of the Act. By permitting discriminatees to commit perjury with impunity and by participating in the subornation of that perjury, the Board has failed to effectuate the policies of the Act.

The affidavits evidencing Mr. Mitkovski's perjury, that were sent anonymously to Overseas Motors, were taken by the Board itself after the original backpay hearing and prior to the proceedings on remand by Mr. Jerome

Schmidt, Counsel for the General Counsel. On July 29, 1987, Mr. Schmidt wrote to John F. Falcone, Assistant General Counsel, Division of Operations Management, expressing grave concern over the veracity of Mr. Mitkovski's statements and essentially giving his opinion that this evidence must be furnished to the administrative law judge. Mr. Schmidt told Mr. Falcone in his letter that:

> "If we're to excuse or justify the [Charging Party's] alleged solicitation of false testimony, justice is undermined as a basic premise of the system is [sic] that we don't bear false witness. If we try to excuse false testimony or the solicitation thereof, we no longer have ethical standards but 'situation ethics' under which the judicial system can't function."

Mr. Schmidt further advised Mr. Falcone that he was unable to verify the existence of the money given to Mr. Mitkovski in connection with the loans. The Board failed to act on this evidence of perjury. Not until the evidence was anonymously sent to Overseas Motors and Overseas Motors demanded further hearings did the Board capitulate. Ironically, these additional proceedings were held before the Honorable Robert W. Leiner, the same administrative law judge who had presided over the previous two backpay hearings, and who, when questioned by Overseas Motors counsel, acknowledged that he too had received the evidence of Mr. Mitkovski's perjury and not acted upon it, claiming that when he opened it and saw what it was he simply passed it along to the Board without reading it. Where is the due process to which Overseas Motors is entitled?

Respondents Mr. Mitkovski and the Board argue that this case is simply a disagreement over a few facts that is properly left to the lower courts, but it is not. There

are no facts in dispute. Even Judge Leiner determined that:

1. Mr. Mitkovski's expenses exceeded his income during the backpay period;

2. Mr. Mitkovski failed to account for the discrepancy between his expenses and his income; and

3. Mr. Mitkovski perjured himself and attempted to suborn the perjury of witnesses at the backpay hearing in an effort to increase his recovery.

Judge Leiner simply drew the inference that Mr. Mitkovski did not conceal interim earnings. The Board drew the inference that he did and based upon the Board's Brief in Opposition to Overseas Motors' Petition the Board has apparently not changed its position in this regard. There is no credibility issue involved here which requires the observation of any witness's demeanor. Thus, the Board's determination should not have been overturned by the Court of Appeals unless, in applying the rule of *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), the Court determined that the Board's decision was not supported by substantial evidence. At best, the Court of Appeals misapplied this rule by concluding that the Board improperly overturned the decision of the administrative law judge because the administrative law judge's decision was supported by substantial evidence.

The Board, in its Brief in Opposition to Overseas Motors' Petition, interprets the decision of the Court of Appeals to provide that Mr. Mitkovski's perjury in attempting to inflate the value of the loans did not impeach the credibility of his testimony respecting his efforts to obtain additional interim employment. If this is the basis of the decision of the Court of Appeals, then it must clearly be overturned so that this matter can be remanded to the Board because the Board never

made a determination as to whether Mr. Mitkovski had properly sought to mitigate his damages by seeking interim employment. Arguably, the Court of Appeals was of the view that since Judge Leiner had discussed the mitigation issue and the Board had denied backpay it had necessarily considered the mitigation issue itself. However, a fair reading of the Board's decision discloses that it did not reach the mitigation issue. Moreover, the Court of Appeals is not free to circumvent the Board's jurisdiction to make the initial determination on the merits. It is incompatible with the orderly function of the process of judicial review to permit otherwise. *NLRB* v. *Metropolitan Life Insurance Company*, 380 U.S. 438, 443 (1965).

Mr. Mitkovski argues that the Board has "no business" denying all backpay to a discriminatee who has committed and suborned perjury. In support of this argument, reference is made to *Ad Art Inc.*, 280 NLRB 985 (1986). However, what Mr. Mitkovski does not indicate is that the reference is simply to a concurring decision filed by Member Stephens. There is another concurring decision that was filed by Chairman Dotson which much more closely reflects the Congressional mandate imposed upon the Board to effectuate the policies of the Act. Speaking of claimants who fraudulently conceal interim earnings, Chairman Dotson stated:

> "Although I consider the denial of backpay to such claimants to be mandated by the status quo ante principles underlying the Board's remedial processes, I am compelled to note that a denial of backpay in all cases of willful concealment most forcefully and effectively serves to promote the integrity of the Board's compliance processes by discouraging claimants from contemplating the concealment of interim earnings. While I have no doubt that the vast majority of

> claimants would never seriously consider the fraudulent concealment of interim earnings, those few who may entertain such a notion are far less likely to engage in such misconduct if faced with the certain denial of all backpay on discovery of willful concealment. Similarly, the achievement of greater public confidence in the integrity of our compliance processes and in the accuracy of backpay specifications is far more likely to increase voluntary compliance by respondents short of litigation. In times of budgetary restraint and limited resources prompt settlement of often complex backpay cases can only serve as an aid in carrying out the mission of this Agency." [footnotes omitted]

In light of the Board's confusion over its mandate from Congress and its failure to uphold even a minimum level of integrity over its adjudicative processes, the need for review of the action below is indisputable; indeed, Petitioner suggests that summary reversal is proper and just now in order to demonstrate that perjury before Federal agencies will not be tolerated under the laws of this land.

Respectfully submitted,

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